

SELECT EXTRACTS

FROM

BLACKSTONE'S COMMENTARIES,

CAREFULLY ADAPTED TO

The Use of Schools and Young Persons;

WITH

A GLOSSARY, QUESTIONS, AND NOTES.

AND

A GENERAL INTRODUCTION.

By SAMUEL WARREN, Esq. F.R.S.

OF THE INNER TEMPLE.

Est quōdam prodire tenus, si non datur ultra.—HOR.

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MR. Warren's share of this work is limited to the original suggestion, plan, and general superintendence of it while passing through the press—the framing of the “Questions,” and a few of the Notes, as well as the composition of the “Introduction” and “Glossary.”

The principal selection of the ensuing Extracts, together with almost all the Notes, and the “Continuation” of the last chapter of the Commentaries down to the present time, have been undertaken by a gentleman at the Common Law Bar, of very great general, as well as professional acquirements and experience.

A. M.

*Bell Yard, Lincoln's Inn Fields,
20th Nov. 1836.*

INTRODUCTION.

TRUE patriotism consists of an *intelligent* attachment to the institutions of our country. We love, or rather we ought to love, an object, in the proportion in which we perceive it to be worthy of our love ; and in this is implied a fair knowledge of its qualities. It would surely be absurd to hear a person constantly uttering passionate expressions of fondness for an individual of whom he proves, upon inquiry, to know little or nothing beyond the *name* ! When pressed to explain the grounds of his attachment, he stammers, with an embarrassed air, “ Oh everybody loves So-and-so,” or “ I ought to love him,” or “ I am taught to love him.” Is not this calculated to excite a smile of surprise, and even contempt ? And yet, how many are there who act thus towards their country !—Who have the ‘ love of their country ’ constantly on their lips ; they ‘ prefer its interests to their own ; ’ they would ‘ make any sacrifice in behalf of the constitution ; ’ they would ‘ lay down their life for it ; ’ it is their ‘ fervent desire to hand it down unimpaired to their latest posterity.’ If a person of this description were asked, *what* is it that you so love, for which

you would do, and sacrifice, so much, and are so desirous that your latest posterity should enjoy what satisfactory answer would he make?

It is obvious, then, that before a man can be allowed rationally and worthily to love his country and her institutions, he must be in some measure capable of understanding and appreciating them ; and this cannot be, without considerable inquiry and reflection.

“ But,” says another, “ I love my country for this plain reason—her institutions’ secure liberty.” Has he, however, at any time troubled himself to inquire *how* they answer so noble an end ? Or has he hitherto rested satisfied with catching a few cant phrases, taking everything for granted that he hears uttered upon the subject, dignifying every fluctuating fancy and prejudice with the imposing name of patriotism ? It certainly may be excusable, or rather fitting, for one whom Providence has placed in the humblest sphere of society, to say, “ I feel, I know, that I live in a country where I enjoy perfect freedom and safety, both of person and property, and I love the country that secures me such principles—her institutions must be admirable ; and though I have not the means of ascertaining their nature, yet I can venerate, and will support them.” But how does this language sound in the mouth of one who professes to have received a liberal education, to move in a superior circle of society, to be entitled even to discuss—to form, to express, and to disseminate opinions upon—the gravest constitutional questions that can be proposed ?

Let it then be said that we love, in our country,

an object which confers signal benefits upon us ;— towards which, therefore, we cultivate feelings of intelligent gratitude. Is it any evidence of our sincerity, is it respectful to that country, to make no attempt to become acquainted with any part of the structure and economy of its constitution, when we have it so easily in our power to do so? Do we, nevertheless, assume a confident tone in speaking of its *defects* and the remedies that we conceive necessary? do we venture to attempt alterations in a machinery of which we are entirely ignorant?—How many a fluent and confident declaimer, and even writer,* upon political subjects, would startle himself into making exertions to become really

* The confused and imperfect notions of many who assume to deal with subjects of constitutional law are thus alluded to by Paley :—" Most of those who treat of the British constitution, consider it as a scheme of government formally planned and contrived by our ancestors, in some certain era of our national history, and as set up in pursuance of such regular plan and design. Something of this sort is secretly supposed, or referred to, in the expressions of those who speak of the " principles of the constitution," of bringing back the constitution to its " first principles," of restoring it to its " original purity," or " primitive model." Now this appears to me an erroneous conception of the subject. No such plan was ever formed ; consequently no such " first principles," " original model," or standard, exist : I mean, there never was a date or point of time in our history when the government of England was to be set up anew, and when it was referred to any single person, or assembly, or committee, to frame a charter for the future government of the country ; or when a constitution, so prepared and digested was, by common consent, received and established."—*Moral and Political Philosophy*. book vi., c. vii.

acquainted with the laws and constitution of his country, if he could be persuaded secretly to cast his eye over the list of the contents of this little volume, for instance, and ascertain the extent of his acquaintance with them! How many important matters would he there find of which he knew literally nothing; or, 'at most, possessed only a slight and superficial smattering!' What *clear* and *distinct* notions has he of some even of the most notorious topics—of Magna Charta, the Petition of Rights, the Habeas Corpus Act, the Bill of Rights, the Act of Settlement, the Doctrine of the Hereditary Right to the Throne, the Successions, the Prerogative of the King, the Constitution and Powers of Parliaments, Trial by Jury, with very many others that could be mentioned. How easily is such an one the dupe of delusion! how numerous and dangerous are the delusions he aids in disseminating! How can he justify his support of the existing order of things, or vindicate his adherence to those who would effect changes in them? If the principle of one great party in the state, as pointedly observed by Mr. Hallam, be *conservation*, of the other *melioration*, how can the man we are speaking of, attach himself to either? What value have his opinions—what weight can be attached to them? Can one so ignorantly acquiescent, or so ignominiously active, be said to possess *true patriotism*? science of the laws and constitution of our country," says the illustrious commentator, "is a of knowledge in which the gentlemen of England have been more remarkably deficient than those of all Europe besides." Would that there

were *now* less foundation for this severe reproach, than when it was uttered!—now even, despite the showy pretensions everywhere exhibited, the increased attention to political matters that has been excited, the restless energy that has been developed in all ranks of the community!

Genuine patriotism, however, will not expend itself upon duties of so general and public a description as those just alluded to, but will incline its possessor to the careful consideration of his own position as an individual member of the state,—the *personal* privileges and duties conferred and imposed by the constitution under which he lives. If it produce not this result, it is nothing but a name—a delusion.

Vir bonus est quis?

Qui consulta patrum, qui leges juraque servat!

It is to ensure so desirable a result as this, that a real lover of his country would wish to see his fellow-countrymen everywhere animated with a desire to be really well-informed upon a matter of such high concernment as how he may conduct himself in all respects as a good citizen, in the discharge of both his public and his private duties. Can it be necessary to search for illustrations? They will be found in almost every page of this volume. One or two may, however, be here briefly presented to the intelligent and candid reader.—Who is there, for instance, in any rank of life, that may not at one time or other be called upon to become an *executor*, an *administrator*, or a *trustee*, or be placed otherwise in situations where

he will be called upon for advice, and also to act, in sudden and very serious emergencies amongst his relatives and friends, or when such shall have happened to himself? In what a situation will he be placed if he should find himself wholly ignorant of the matters which are then forced upon his attention—if compelled either to confess his incapacity, and be utterly useless in the most grievous exigences,—or if he should rashly undertake to act, and by his ignorance entail distress, and perhaps ruin, upon himself, and upon those whom he anxiously wished to serve! If, on the contrary, at the expense of but very moderate exertions, he should have made himself acquainted with even the little that is contained in this volume upon the subjects above alluded to, how sensible will he be of the advantages it has conferred upon him!—the very least of which will be that he is aware of the general nature of the duties that may devolve upon him, the responsibility he has incurred or is about to incur, and so he will be guided accordingly. It were endless, however, to cite examples such as this—to point out the advantage, and indeed the necessity, of being in some measure acquainted with the “laws and institutions of our country,” even on occasions so private as that just alluded to: but there is one other instance which may be cited, and

in the unpressive language of a very authority, Sir Michael Foster, quoted by Sir William Blackstone in his Commentaries*.

The knowledge of that branch of jurisprudence

* *Post*, page 329.

which teaches the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For, as a very great master of the crown law (Sir M. Foster) has observed upon a similar occasion, no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events which the compass of a day may bring forth, will teach us, upon a moment's reflection, that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern*."

What situation in life, in short, what position, can be occupied, from the very lowest to the highest—in the ecclesiastical, the military, the naval, or the civil state, with all its numerous departments and gradations—that has not its particular laws and regulations to be punctually observed, before it can be filled with decency, or dignity? Wisely, therefore, has it been laid down by the distinguished author of the Commentaries on the Laws of England, "as an undeniable position, that a competent knowledge of the laws

* See the outlines of the leading doctrines of the criminal law, *post* pp. 329—379.

of that society in which we live is the proper accomplishment of every gentleman and scholar, a highly useful,—almost an essential part of a liberal and polite education *. And in this," he adds, "I am warranted by the example of ancient Rome; where, as Cicero informs us, the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium*, or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country †."

The necessity of early supplying our youth, especially intelligent and respectable youth, with correct information on so interesting and all important a subject as the laws and constitution of their country, at least their leading doctrines, may be deduced from one circumstance peculiar to the present stirring and eventful times: that from whatever cause, and with whatever result, political topics are every day forcing themselves more and more upon the attention of all classes of society. There are many who rejoice at this, many that deplore it; but that such is the *fact* no one will doubt. The eyes of all are directed incessantly, some with an affectionate and anxious, others with an eager and insolent scrutiny towards the structure of our laws and constitution, in order to test its fitness for the exigences of the times, to detect its imperfections, and devise the necessary remedies. In such a view of the case, what can be more desirable than early to instil into the young and inquiring mind, from a pure source, accurate and

* *Post*, page 1.

† *Id. ibid.*

enlightened notions! What a safeguard will be thus supplied against false and dangerous doctrines, what a facility for comprehending the scope and effect of the important changes that are from time to time proposed, and effectuated—for entering into and understanding the many great questions of parliamentary discussion! In these practical times what avails it that the intelligent youth is, after years of severe drudgery, duly skilled in the ancient metres, the mysteries of mythology, the varieties of dialect, the niceties of grammatical construction; that he has the geography of Greece and Rome, with every spot, in every province and colony, so accurately delineated in his mind that he can point out in an instant the scene of every event, great or small, in their respective histories; that he has got, moreover, something like an inkling of the elements of algebra and geometry,—if, all the while, he knows little or nothing of the land he lives in, its laws and institutions? Very far be it from us to undervalue the precious fruits of a sound classical education; to echo the ignorant absurdities that are now and then vented upon this subject; to lose sight of the advantages it confers, in point even of mere mental discipline, or the high and generous tone it is calculated to communicate to the minds of youth: but one may be permitted to doubt the expediency of so exclusive and absorbing an attention to classical subjects, as that which has been, and still is too generally exacted by those who direct the education of youth. With regard, for instance, to English history—what is the real amount of knowledge possessed of it

by three-fourths of the youth of every rank and class, that are educated at our schools, both public and private?—A slight superficial acquaintance with the succession of the Kings and Queens; the leading battles, sieges, rebellions, conspiracies, state trials, and executions, with the names of the leading persons concerned in them, and a few of the most prominent incidents connected with them! These are the portions of English history that are naturally calculated to prove most attractive to youth, to arrest their attention, at once to stimulate and exhaust it: the rest is passed over as dull and uninteresting, and therefore entirely neglected. The great battle of Hastings, for instance;—the frantic bravery of Harold—his defeat and death—the triumph of the Norman Conqueror,—most boys have read with eager interest: they can tell how differently the respective armies spent the night preceding the battle—how Harold “flew from rank to rank”—how he and William disposed their soldiery—the crisis at which William’s skill and bravery turned the fate of the day—the frightful slaughter that ensued:—but where is the boy that thinks of looking, or is directed to look, any further into this matter—who adverts even for a moment to the only part of it that is really valuable,—the vast alteration then effected in the laws and institutions of our country, the manner and consequences of the introduction and adoption of the *feudal system*? In the most popular school-‘abridgment,’ of the ‘History of England,’ that of Doctor Goldsmith, this subject is not even alluded to!

In very few schools is there any attempt now made to *teach* English history, however readily the importance of doing so is admitted. School compilations there undoubtedly are ; but their perusal is either wholly optional to the scholar, or required in such miserable misproportion to the other studies of the school, as to be attended with no solid or permanent advantage—neither impressing the memory nor informing the understanding. No one, on the contrary, that has turned his attention to this subject, can have failed to remark the very great superiority of the knowledge possessed by school-boys of Grecian and Roman history, over that of their own country—and why? Firstly, because, as already observed, they are seldom, if ever, required to make the latter an object of *study* at all ; secondly, even where they are, the very different manner in which a master conducts the two studies, accounts for the very different result. Is he satisfied with requiring the youth merely to read over, however carefully, a given portion of either Grecian or Roman history ? No ; he accompanies and illustrates its perusal by that of another book, of Potter's or Adams' Antiquities, which are respectively to Grecian and Roman history what the present volume will prove to English history :—throwing light upon the most difficult and obscure passages, as well as investing them with a lively interest, and impressing them firmly upon the memory, by exhibiting the peculiar nature of the institutions, laws, habits, and customs of the country.

The youthful reader of these pages is assured that he will find in them a great light cast upon

innumerable, but especially the more early, portions of the history of our country, by the discussions respecting the origin and progress of our laws, which are here presented to his notice*. All laws, he must reflect, originate in the feelings, characters, and exigences of those for whom they are enacted; and, as it is with these feelings, characters, and exigences, and the various events which produce or affect them, that history is principally conversant, surely nothing that tends to illustrate them can be unimportant or uninteresting to the student of history†. If, then, history, especially the history of one's own country, be really an essential branch of education, it cannot be too much to repeat, that this little volume, tending so obviously to enhance the advantages and facilitate the prosecution of that study, will enjoy a favourable reception as its comitant.

* A very striking illustration of the truth of this remark will be found, *post*, pp. 404—406, in the note giving a brief and popular account of the introduction of the system of *uses* and *trusts*.

† “The constitution of England,” observes Dr. Paley, “like that of most countries of Europe, hath grown out of occasion and emergency; from the fluctuating policy of different ages; from the contentions, successes, interests, and opportunities of different orders and parties of men in the community. It resembles one of those old mansions which, instead of being built all at once after a regular plan, and according to the rules of architecture at present established, has been reared in different ages of the art, has been altered from time to time, and has been continually receiving additions and repairs, suited to the taste, fortune, or conveniency of its successive proprietors.”—*Moral and Political Philosophy*, Book vi., chap. vii.

It must, we think, be admitted, therefore, that English history, *thus* studied, would form at least a very valuable, if not even an essential, element in every system of education. Consider what time and pains are spent upon teaching the elements of geography, chronology, and even astronomy; how in many establishments youths are carefully catechised every week, or oftener, in order to fix in their minds often the minutest details concerning—even the names and places of different stars—the costumes of different countries, ancient and modern—the most curious products of distant regions—the dates of events, often as unimportant as important: these are the occupations which in most schools, it is believed, fill up almost every spare moment that is not devoted to Greek, Latin, and ciphering. That they are useful, and often interesting objects of attention, is not intended to be denied; but is it asking too much to permit the present volume, not to supersede them, but to *share* with them the attention of master and scholar? The more that this request is considered the more reasonable will it appear. What a large proportion, for instance, of respectable youth are devoted, at an early period of their lives, to the various branches of the legal profession, as attorneys, proctors, barristers, to whom an acquaintance with the important topics of this volume, gradually and easily acquired, will be attended with the happiest effect, quickening and stimulating their relish for a profession and a study, the principles of which are so valuable, so noble—which it will be ere long the business of their lives to carry out into practice, and earn thereby an honourable livelihood, a high

station, and a lasting reputation ! How many a hesitating parent or child, in that trying period of incertitude as to the choice of a profession known to almost all, may be happily determined by predictions derived from the perusal and study of this volume, when at school ; giving thus, perhaps, to the legal profession, one who, instead of pining in the wretched obscurity of an ungenial calling, will rise to be one of the brightest ornaments of the Bar, the Bench, or the Senate ! What an interesting and inspiring task must it be to the teacher, whose heart is in his work, who desires to train up a useful member of society, to drop into the fertile mind of an eager and gifted pupil the seeds that shall soon ripen into a noble and intelligent patriotism, to trace the progress of our liberties through all the chequered scenes of our history—to point out the origin and growth of our most valued institutions !

It is often and truly said, that we live under one of the most artificial and complicated constitutions ever possessed by a country : why, then, should we not endeavour to familiarise the minds of our youth betimes with its machinery and mode of working ?

That such subjects as those here spoken of should have failed in forcing their way into the middling classes of schools in this country is sufficiently surprising ; but that they should have been disregarded in the great public schools and other places of education, where are educated youth of such birth and fortune as ensure their becoming, ere long, public and influential members of society, is singular and melancholy. Are these times, when the youthful representative of a great family, and heir of a

commanding fortune, after eight or ten years' *incarceration* in Greek and Latin literature, with a very few subsidiary pursuits, should be hurried off to the University, eager for classical or mathematical distinction ; and then have to acquire for the first time, perhaps in the heat of some sudden emergency, the veriest elements of legal and constitutional knowledge ; rushing upon hustings and into Parliament, hot from a first glance at Blackstone or De Lolme, with no distinct ideas, no settled opinions upon subjects which, nevertheless, they assume to handle with a most mischievous and daring familiarity ! How pitiable is their position ! What is to become of them in the presence of those who wield the weapon of audacious assertion ? So far from being able to detect and expose the most impudent and noxious fallacies, they can scarce conceal their own scandalous ignorance of the veriest elementary principles and practical details !—How different will be the case of the intelligent youth who under judicious superintendence shall, even during his school-days, have become moderately familiar with the contents of this volume ! How easily and rapidly can he hereafter ingraft upon his early and accurate knowledge, the most valuable acquirements, legal and constitutional ! To such an one, every event recorded in the history of his country, and transpiring from day to day, is possessed not only of interest, but of practical utility ; as evidencing, like straws borne along the surface of a rapid stream, the operation and tendency of those great principles by which events and national actions are regulated ; and,

consequently, guiding him to correct conclusions concerning them. "Political innovations," says Paley, "commonly produce many effects beside those that are intended. The *direct* consequence is often the least important. Incidental, remote, and unthought-of evil and advantages frequently exceed the good that is designed, or the mischief that is foreseen. It is from the silent and unobserved operation, from the obscure progress of causes, set at work for different purposes, that the greatest revolutions take their rise. * * In politics, the most important and permanent effects have, for the most part, been incidental and unforeseen; and we inculcate this proposition for the sake of the caution which teaches that changes ought not to be adventured upon without a *comprehensive* discernment of the consequences—without a knowledge as well of the remote tendency, as of the immediate design*.'

The present work may, in short, be correctly considered as a *key to the history of England*: explaining what is difficult, illustrating what is obscure, affording a clue to all its complicated and distracting details, giving interest to what would at first sight appear dry and repulsive—throwing light, in short, upon the whole mechanism of the British constitution, and enabling the young and intelligent reader early to understand and appreciate the celebrated observation of Montesquieu, hath not scrupled to profess, even in the bosom of his native country, that the English are the only nation in the world WHERE POLITICAL

* *Moral and Political Philosophy*, book vi., chap. vii.

OR CIVIL LIBERTY IS THE DIRECT END OF ITS CONSTITUTION."

Having thus, by the foregoing observations, endeavoured to point out the advantage of supplying youth, at an early period of their education, with accurate and intelligible information upon so important a subject as that of the laws and constitution of their country, it is time to advert to the celebrated work which has supplied the materials for the present volume, and then to state the principles on which its compilers have proceeded in making their selections. The writer of this introduction recently had occasion, in the course of another work, to collect together a few of the numerous testimonies to the merit of the Commentaries on the Laws of England, borne by various statesmen, philosophers, lawyers, as well as other very competent judges: and a few of them are here presented to the reader.

"He it was," said Lord Avonmore, speaking of Sir William Blackstone, "that first gave to the law the air of a science. He found it a skeleton, and clothed it with life, colour, and complexion: he embraced the cold statue, and by his touch it grew into youth, health, and beauty."

"In Blackstone's Commentaries," said the great Lord Mansfield, "your son will find analytical reasoning diffused in a pleasing and perspicuous style. There he may imbibe imperceptibly the first principles on which our excellent laws are founded *."

"You, of course," said C. J. Fox, "read Blackstone over and over again; and, if so, pray tell me whether you agree with me in thinking his style of English the very best of our modern writers: always easy and intelligible — far more correct than Hume, less studied and made up than Robertson. His purity of style I particularly admire. He was distinguished as much for simplicity and strength, as any writer in the English language*."

"He it was," wrote Jeremy Benham, "who, first of all institutional writers, has taught Jurisprudence to speak the language of the scholar and the gentleman; put a polish upon that rugged science, and cleansed her from the dust and cobwebs of the office; decked her out to advantage from the toilet of classic erudition; enlivened her with metaphors and allusions, and sent her abroad in some measure to instruct, and in still greater measure to entertain the miscellaneous, and even the most fastidious societies†."

"Blackstone's Commentaries," said Sir William Jones, "are the most correct and beautiful outline that ever was exhibited of any human science‡."

Notwithstanding, however, these splendid testimonials, it cannot be denied that the four volumes of the great work to which they relate are far more frequently lauded than studied, or even perused — especially by non-professional people:

* Trotter's Memoirs of Fox, p. 512.

† Fragment on Government, Pref., xxxix.

‡ Law of Bailments, p. 3.

and the reason of this it is not difficult to discover. They contain much that is very abstruse, that is merely technical; very much that is now obsolete: and those portions that are popular and intelligible to non-professional readers are very difficult of discovery to those who are not familiar with the system and arrangement of the Commentaries.

In the present volume, two professional gentlemen, intimately acquainted with the Commentaries, have united their efforts for the purpose of selecting illustrating, and arranging all those portions which are calculated to interest and instruct youth, and, indeed, general readers of every rank and condition, without the slightest tincture of party politics. Not a line will be found in this volume which can exceed the capacity, or offend the delicacy, even of female youth. No pains have been spared to present, from time to time, a brief but accurate notice of the leading changes in *general law*, which have been effected since the text was penned by Blackstone; to distribute and arrange the extracts, notes, and questions, in such a manner as will be best suited for the purpose of study on the part of youth, and of examination on the part of their preceptors. May not, then, such a work as the present—containing, in fact, the very cream of Blackstone's Commentaries—be considered fairly entitled to the approbation of all those who are intrusted with the education of youth? And, suppose it introduced into establishments where a liberal system of education is carried on,—with what little effort, with what a slight variation of the existing order and method

of the business of the school-room, can its all-important contents be brought to the notice of the scholar * ! ”

A sincere desire to benefit the rising generation, by placing early within their reach, in an attractive form, the elements of the laws and constitutions of their country, has induced the compilers of this volume to sacrifice to its preparation several precious intervals of leisure, as well as to interrupt their professional avocations; and they now lay the result of their humble but cheerful labours before the public, with a confident hope that they will be duly appreciated and encouraged.

* The writer of these pages has long been of opinion that Blackstone's Commentaries contained materials for a most valuable school-compilation; and thus expressed himself, upon the subject, in a late publication :—

“ It is surprising that a work so celebrated as this, for its pure and beautiful language, lucid arrangement, and universally interesting and important topics, should not have been long ago adopted as a school-book—at least for the senior classes of scholars—especially when it is recollected how considerable a proportion of youth are destined for the various departments of the legal profession. Would it not be highly advantageous for parents, in such cases, to propose prizes to their sons, for superior proficiency in Blackstone's Commentaries ? ”—*Popular and Practical Introduction to Law Studies*, pp. 480-1.

The Inner Temple, London,
20th Nov. 1836.

CONTENTS.

INTRODUCTION	vii.—xxvi
Importance of a general Acquaintance with the Laws of England	1
Laws in general—the Law of Nature—Revealed Law—The Law of Nations	9
On Municipal Law	15
The Laws of England	27
The Countries subject to the Laws of England	42
The absolute Rights of Individuals generally	58
The absolute Rights of the Inhabitants of Great Britain	63
The Constitution of the British Parliament—the King—the Lords Spiritual and Temporal—the Commons	75
The Powers and Privileges of Parliament	84
The House of Commons—its Constitution, and the Method of electing Members	90
Routine of Business in the Houses of Parliament, with their Adjournment, Prorogation, and Dissolution	98
The Doctrine of the Hereditary Right to the British Throne	107
The History of the Succession of the British Monarchs	114
The King's Royal Family	135
The King's Counsellors	140
The King's Duties	144
The King's Prerogative	146
Sheriffs—Coroners—Justices of the Peace—Constables	160
The People—Allegiance, Natural-born Subjects, Aliens, Deni- zens, Naturalization	172
The Clergy	178
The Civil State—Nobility, Knighthood, Baronets, Esquires, Gentlemen	190
The Military and Naval Estates	200
Master and Servant	206
Husband and Wife	211
Parent and Child	212

Guardian and Ward	223
Corporations	228
The Origin and Growth of Property	241
Real and Personal Property	254
The Feudal System	256
The ancient English Tenures	263
The modern English Tenures	278
Wills of Personal Property, and Administration of the Goods of Intestates	286
Wills of Real Property	294
The Nature of Personal Property	296
The Superior Courts of Law, and of Equity	298
The Writ of Habeas Corpus	312
The supposed Uncertainty of the Law	319
The Examination of Witnesses, <i>viva voce</i>	324
Trial by Jury	326
Crimes and Misdemeanors	329
Certain Excuses for the Commission of a Crime, recognised by the Law of England	332
High Treason	343
Felony	346
Homicide—Justifiable, Excusable, Felonious	348
Indictment—Grand Jury	365
Arraignment	367
The Trial	369
Judgment, and its Consequences	373
Reversal of Judgment	376
Reprieve and Pardon	378
The Rise, Progress, and Gradual Improvement of the Laws of England—from the earliest Period to the Year 1836	382

IMPORTANCE OF A GENERAL ACQUAINTANCE WITH
THE LAWS OF ENGLAND.

THE science of the laws and constitution of our own country, is a species of knowledge in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the Civil or Imperial law, under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

I think it an undeniable position, that a competent knowledge of the laws of that society in which we live, is the proper accomplishment of every gentleman and scholar; a highly useful, I had almost said essential, part of a liberal and polite education. And in this I am warranted by the example of ancient Rome; where, as Cicero informs us, the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium*, or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country.

But as the long and universal neglect of this study with us in England seems in some degree to call in question the truth of this evident position, let us proceed to demonstrate the utility of some general acquaintance with the municipal

ON THE STUDY

law of the land, by pointing out its particular uses in all considerable situations of life.

And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect for a moment on the singular frame and polity of that land, which is governed by this system of laws,—a land perhaps, the only one in the universe in which political or civil liberty is the very end and scope of the constitution. This liberty, rightly understood, consists in the power of doing whatever the laws permit; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As, therefore, every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure as well as inconvenience, of living in society without knowing the obligations which it lays him under.—And thus much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those, on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public; and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

Let us therefore begin with our GENTLEMEN OF INDEPENDENT ESTATES AND FORTUNE, the most useful as well as considerable body of men in the nation; whom, even to suppose ignorant in this branch of learning, is treated by Mr. Locke as a strange absurdity. It is their landed property, with its long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession; yet still the understanding of a few leading principles, relating to estates and conveyances, may form some check and guard upon

a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition*.

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice, are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

But to proceed from *private* concerns to those of a more *public* consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity even of our best juries to do this with any tolerable propriety, has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges, to direct, controul, and even reverse their verdicts, than perhaps the constitution intended.

But it is not as a juror only, that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow subjects: it is principally with this order of men, that the commission of the peace is filled. And here a very ample field is open for a gentle-

* One of the most distinguished real property lawyers living, the late Lord Chancellor of Ireland (Sir Edward Sugden), published a very useful little work, called "*Letters to a Man of Property on the Sale of Estates.*" 6th Edition, 1829.

man to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences, and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also (under which must be included the knowledge), of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

Yet further; most gentlemen of considerable property, at some period or other of their lives, are ambitious of *representing their country in parliament*; and those who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics; that they may list under party banners; may grant or withhold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

What is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the NOBILITY of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence

and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law; to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable; no appeal, no correction, not even a review can be had; and to their determination, whatever it be, the inferior courts of justice must conform, otherwise the rule of property would no longer be uniform and steady.

The Roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scævola, the then oracle of the Roman law; but, for want of some knowledge in that science, could not so much as understand even the technical terms which his friend was obliged to make use of. Upon which Mutius Scævola could not forbear to upbraid him with this memorable reproof, "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law, wherein he arrived to such a proficiency, that he left behind him about a hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero, a much more complete lawyer than even Mutius Scævola himself.

I would not be thought to recommend to our English nobility and gentry, to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator; but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable in those who are entrusted by their country to maintain, to administer, and to amend them.

Nor will some degree of legal knowledge be found in the least superfluous to persons of inferior rank, especially

those of the **LEARNED PROFESSIONS**. The *clergy*, in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony and simoniacal contracts; to uniformity, residence, and pluralities; to tithes and other ecclesiastical dues; to marriages, more especially of late, and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired than by use, and a familiar acquaintance with legal writers.

For the gentlemen of the *faculty of physic*, I must frankly own that I see no special reason why they in particular should apply themselves to the study of the law, unless in common with other gentlemen, and to complete the character of general and extensive knowledge—a character which their profession, beyond others, has remarkably deserved. They will give me leave, however, to suggest, and that not ludicrously, that it might frequently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution.

But those gentlemen who intend to profess *the civil, and ecclesiastical laws*, in the **SPIRITUAL AND MARITIME COURTS** of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption. In which we are not singular in our notions: for even in Holland, where the imperial law is much cultivated, and its decisions pretty generally followed, we are

informed by Van Leeuwen, that it "receives its force from custom and the consent of the people, either tacitly or expressly given: for otherwise (he adds) we should no more be bound by this law, than by that of the Almains, the Franks, the Saxons, the Goths, the Vandals, and other of the ancient nations." Wherefore, in all points in which the different systems depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical*. And, in those of our English courts, wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law, in either instance, both may, and frequently does, prohibit and annul their proceedings: and it will not be a sufficient excuse for them to tell the king's courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota, or imperial chamber. For which reason it becomes highly necessary for every civilian and canonist, that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, the king's military, and the king's ecclesiastical law. The propriety of which inquiry the University of Oxford has for more than a century so thoroughly seen, that in her statutes she appoints that one of the three questions to be annually discussed at the act by the jurist-inceptors shall relate to the common law; subjoining this reason, "*quia juris civilis studiosos decet haud imperitos esse juris municipalis, et differentias externi patrique juris notas habere.*" And the statutes of the University of Cambridge speak expressly to the same effect.

It must be confessed that the study of the laws is not merely a matter of amusement; for, as a very judicious writer has observed upon a similar occasion, the learner

* See post, pp. 35—8.

"will be considerably disappointed if he looks for entertainment without the expense of attention:" an attention, however, not *greater* than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favourite recreation or exercise. And this attention is not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtle distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of Sir John Fortescue, when first his royal pupil determines to engage in this study. "It will not be necessary for a gentleman, as such, to examine with a close application the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if under the instruction of a master he traces up the principles and grounds of the law, even to their original elements. Therefore in a very short period, and with very little labour, he may be sufficiently informed in the laws of his country, if he will but apply his mind in good earnest to receive and apprehend them. For, though such knowledge as is necessary for a judge is hardly to be acquired by the incubations of twenty years, yet with a genius of tolerable perspicuity, that knowledge which is fit for a person of birth or condition, may be learned in a single year, without neglecting his other improvements."

QUESTIONS.

What means were taken to teach the laws to the youth of ancient Rome?

State the private and public considerations which ought to weigh with gentlemen of independent estates and fortune, in acquiring some knowledge of the principles of law.

What led to the reproof of Servius Sulpicius by Mutius Scævola—and what was the effect of it?

Will knowledge of the laws be of any advantage to the clergy and the medical profession?

Why is it especially incumbent on those practising in the spiritual and maritime courts to be acquainted with our municipal law?

What force has the civil law in this country?

LAWS IN GENERAL—THE LAW OF NATURE—
REVEALED LAW—THE LAW OF NATIONS.

"**LAW**," in its most general and comprehensive sense, signifies *a rule of action*; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is *prescribed by some superior, and which the inferior is bound to obey*.

Thus when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain *laws* of motion, to which all moveable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes, at his own pleasure, certain arbitrary *laws* for its direction, as—that the hand shall describe a given space in a given time: to which law, as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we further advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by *laws*, more numerous indeed, but equally fixed and inviolable. The whole progress of plants, from the seed to the root, and from thence to the seed again; the method of animal nutrition, digestion, secretion, and all other branches of vital economy, are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

This then, is the general signification of "*law*:" a rule of

ON THE NATURE OF

action dictated by some superior being; and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action, or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, except such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him on whom he depends as the rule of his conduct; not indeed in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his Maker for every thing, it is necessary that he should in all points conform to his Maker's will.

This will of his Maker is called the Law of Nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator only as a being of infinite power, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite wisdom, he has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the Creator himself, in all his dispensations, conforms; and which he has

enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles : that we should live honestly, should hurt nobody, and should render to every one his due ; to which three general precepts Justinian has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance, its inseparable companion. As therefore the Creator is a being, not only of infinite power and wisdom, but also of infinite goodness, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former ; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised ; but has graciously reduced the rule of obedience to this one paternal precept, " that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature ; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times ; no human laws are of any validity, if contrary to this ; and such of them as are valid derive all

their force, and all their authority, mediately or immediately, from this original.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine Providence, which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct *Revelation*. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state, since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws: that is to say,

no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty, but which are found necessary for the benefit of society to be restrained within certain limits: and herein it is that certain laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder; this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligation *in foro conscientie* to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws than the law of nature and the law of God. Neither could any other law possibly exist; for a law always supposes some superior who is to make it, and in a state of nature we are all equal, without any other superior but Him who is the author of our being. But man was formed for society, is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law, to regulate this mutual intercourse, called "the law of nations;" which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities;

• 14 ON THE NATURE OF LAWS IN GENERAL.

in the construction also of which compacts we have no other rule to resort to but the law of nature, being the only one to which all the communities are equally subject; and therefore the civil law very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

QUESTIONS.

What is *law*, in its most general sense?

What is the *law of nature*?

What are the three general principles to which the emperor Justinian reduced the whole doctrine of law?

What is the one paternal precept to which the law of nature may be reduced?

What was it that rendered necessary the revealed or divine law?

Which is of superior authenticity, the 'law of nature,' or the 'revealed law?' Why?

On what two foundations do all human laws rest?

What do you mean by the *law of nations*?

On what does the law of nations depend?

ON MUNICIPAL LAW.

THUS much it was necessary to premise concerning the law of nature, the revealed law, and the law of nations, before proceeding to treat more fully of the principal subject of this section, MUNICIPAL or CIVIL law: that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian "*jus civile est quod quisque sibi populus constituit.*" It is called *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium*, or free town, yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws and customs.

Municipal law, thus understood, is properly defined to be "A RULE OF CIVIL CONDUCT PRESCRIBED BY THE SUPREME POWER IN A STATE, COMMANDING WHAT IS RIGHT AND PROHIBITING WHAT IS WRONG." Let us endeavour to explain its several properties, as they arise out of this definition.

And, first, it is a *rule*: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a "municipal law;" for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a *rule*. It is also called a *rule*, to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unrea-

sonableness of the thing advised: whereas our obedience to the law depends not upon *our approbation*, but upon the *maker's will*. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

It is also called a *rule*, to distinguish it from a *compact* or *agreement*; for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, "I will, or will not, do this;" that of a law is "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it: in laws, we are obliged to act without ourselves determining or promising any thing at all. Upon these accounts law is defined to be "*a rule*."

Municipal law is also "*a rule of civil conduct*." This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour, than those of mere nature and religion: duties which he has engaged in by enjoying the benefits of the common union; and which amount to no more, than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise "*a rule prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing,

printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who, according to Dio Cassius, wrote his laws in a very small character, and hung them up on high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action, indifferent in itself, is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement: which is implied in the term "*prescribed*." But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he *might* know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But further: municipal law is "a rule of civil conduct prescribed by the supreme power in a state." For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

This will naturally lead us into a short inquiry concerning the nature of society, and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society, either natural or civil; and that, from the impulse of reason, and

through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society, among themselves; which every day, extending its limits, laid the first though imperfect, rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent; and various tribes, which had formerly separated, re-united again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears: yet it is the *sense* of their weakness and imperfection that *keeps* mankind together, that demonstrates the necessity of this union: and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the "original contract of society;" which, though perhaps in no instance, it has ever been formally expressed at the first institution of a state; yet in nature and reason must always be understood and implied in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that, in return for this protection, each individual should submit to the laws of the community; without which submission of all, it was impossible that protection could be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior

be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases, has occasioned one half of those mischiefs which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the Supreme Being; the three grand requisites, I mean, of wisdom, goodness, and of power; wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein, according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation, the qualities requisite for supremacy, — wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a Democracy: the second, when it is lodged in a council, composed of select members, and then it is styled an Aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a Mon-

archy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is, indeed, the most powerful of any; for by the entire conjunction of the legislative and executive powers, all the sinews of government are knit together, and united in the hand of the prince; but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of the law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero declares himself of opinion, "*esse optime constitutam rempublicam que ex tribus generibus illis, regali, optimo, et populari, sit modice confusa*;" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking

of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure*.

But, happily for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and despatch that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and, thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy, as this aggregate body, actuated by different springs, and attentive to different interests composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power sufficient to repel any innovation which it shall think inexpedient or dangerous.

Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, to "prescribe the rule of civil action." And this may be discovered from the very end and institution of civil states. For a *state* is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If, therefore, it is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any natural union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the

whole. It can therefore be no otherwise produced than by a political union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be law.

Thus far as to the right of the supreme power to make laws; but farther, it is its duty likewise. For since the respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

From what has been advanced, the truth of the former branch of our definition is, I trust, sufficiently evident; that "*municipal law is a law of civil conduct prescribed by the supreme power in a state.*" I proceed now to the latter branch of it; that it is a rule so prescribed, "*commanding what is right, and prohibiting what is wrong.*"

Now, in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs. It remains, therefore, only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

For this purpose, every law may be said to consist of

several parts: one, *declaratory*; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another, *directory*; whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial*; whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindictory* branch of the law: whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights, then, which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural duties, such as, for instance, the worship of God, the maintenance of children, and the like, receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature: for that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

But, with regard to things *in themselves indifferent*, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the pur-

poses of civil life. Thus our common law has declared, that the goods of the wife do instantly, upon marriage, become the property and right of the husband; and our statute law has declared all monopolies a public offence; yet that right, and this offence, have no foundation in nature; but are merely created by the law for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to a trespass, or to a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the declaratory part of the municipal law; and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction: The law that says, "Thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The *remedial* part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we properly mean, when we speak of the protection of the law. When, for instance, the declaratory part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested by his death in Titius;" and the directory part has "forbidden any one to enter on another's property, without the leave of the owner:" if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office: will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

with regard to the *sanction* of laws, or the evil that may attend the breach of public duties; it is observed, that human legislators have, for the most part, chosen to make the sanction of their laws rather vindictory than remuneratory, or to consist rather in punishments than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good. For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

Of all the parts of a law the most effectual is the vindictory. "For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must, therefore, observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

QUESTIONS.

What do you mean by the word "*Municipal* law?" State the definition as given in the text.

Why is it called a *rule* of civil conduct? From what does this word "*rule*" distinguish it?

What is the distinction between *municipal*, *natural*, and *revealed* law?

What is meant by "*prescribed*" in the above definition?

What do you understand by an *ex post facto* law ?

Why should all laws be made to commence *in futuro* ?

Why ought not *ignorance* of a law to be allowed as an excuse ?

What do you mean by the expression "*supreme power in a state* ?

What are the only true and natural foundations of society ?

What keeps mankind together, and is the cement of civil society ?

What is meant by the *original contract of society* ?

What are the three grand requisites of every well constituted government ?

What is meant by the sovereign power ?

What are the three forms of government recognised by the ancients ?

Define *democracy*—*aristocracy*—*monarchy*.

What are the respective advantages and disadvantage of these three forms of government ?

Had the ancients any idea of a *mixed* government ?

What did Cicero and Tacitus say on this subject ?

What is the nature and form of the British government ?

Is it the *duty* of the supreme power in a state to make laws ?

What is a state ?

What is imported by the latter part of the definition of municipal law—" *commands what is right, and prohibits what is wrong* " ?

What are the four parts of which every law consists ?

What do you mean by the *declaratory* part of the law ?

What do you understand by "*malum in se*," and "*malum prohibitum*" ?

What is the *directory* part of the law ?

What is the *remedial* part of the law ?

What is meant by the *sanction* of laws ?—and explain the word " *vindicatory sanction*."

Which is the most important of these four parts of a law ?

Why have legislators chosen to make the sanction of their laws consist in *punishment*, rather than *reward* ?

ON THE LAWS OF ENGLAND.

THE municipal law of England, or "*the rule of civil conduct prescribed*" to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, (the unwritten, or common law;) and the *lex scripta*, (the written, or statute law.)

The *lex non scripta*, or unwritten law, includes not only general customs, or the common law, properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws that are, by custom, observed only in certain courts and jurisdictions.

When I call these parts of our law *leges non scriptæ*, I would not be understood as if all those laws were at present merely oral, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional; for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic Druids committed all their laws as well as learning to memory; and it is said of the primitive Saxons, here, as well as of their Brethren on the continent, that *leges sola memoria et usu retinebant*. But with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their

binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that which is "*tacito et illiterato hominum consensu et moribus expressum.*"

Our ancient lawyers, and particularly Fortescue, insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government, and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some: but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance, and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another; though doubtless by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby, in all probability, improving the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, says Lord Bacon, are mixed as our language; and as our language is so much the richer, the laws are the more complete.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his dome-book, or *liber judicialis*, for the general use of the whole kingdom. This book is said to have been extant so late as the reign of king Edward the fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings.

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse; or at least to be mixed and degenerated with other laws of a coarser alloy. So that about the beginning of the eleventh century there were three principal systems of laws prevailing in different districts. 1. The *Mercen-*

Lage, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage*, or laws of the West Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government.

Out of these three laws Roger Hoveden and Ranulphus Cestrensis inform us, King Edward the Confessor extracted one uniform law or digest of laws, to be observed throughout the whole kingdom; though Hoveden and the author of an old manuscript chronicle assure us likewise, that this work was projected and begun by his grandfather, king Edgar. And indeed a general digest, of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces, governed by peculiar customs. As in Portugal, under king Edward, about the beginning of the fifteenth century. In Spain under Alonzo X., who about the year 1250 executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *Las Partidas*. And in Sweden, about the same æra; when a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *Lands Lagh*, being analogous to the common law of England.

Both these undertakings of king Edgar and Edward the Confessor, seem to have been no more than a new edition, or fresh promulgation of Alfred's code or dome-book, with such additions and improvements as the experience of a century and a half had suggested. For Alfred is generally

styled by the same historians the *legum Anglicanarum conditor*, as Edward the confessor is the *restitutor*. These however are the laws which our histories so often mention under the name of the laws of Edward the Confessor, which our ancestors struggled so hardly to maintain, under the first princes of the Norman line, and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws that so vigorously withstood the repeated attacks of the civil law, which established in the twelfth century a new Roman empire over most of the states of the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs, which is now known by the name of THE COMMON LAW. A name given to it, either in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or more probably, as a law common to all the realm, the *jus commune* or *folcright* mentioned by king Edward the elder, after the abolition of the several provincial customs and particular laws before mentioned.

This unwritten, or common law, is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which, for the most part, affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. As to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite

number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the chancery, the king's bench, the common pleas, and the exchequer;—that the eldest son alone is heir to his ancestor;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

But here a very natural, and very material, question arises: how are these customs and maxims to be known, and by whom is their validity to be determined? The answer is, *by the judges in the several courts of justice*. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of "records," in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the conquest, we find the "*præteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those who were held to be "*legibus patriæ optime instituti*." For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly

declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was *not* 'law,' that is, that it is not the established custom of the realm, as had been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration.

The law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law. Upon the whole, however, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law;" in the same manner

as, in the civil law, what the emperor had once determined was to serve for a guide for the future.

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of "Reports" which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of king Edward the second inclusive; and from his time to that of Henry the Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the denomination of the year books. And it is much to be wished that this beneficial custom had, under proper regulation, been continued to this day: for, though king James the First at the instance of Lord Bacon appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time, this task has been executed by many private and contemporary hands, who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect, perhaps contradictory, accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by lord chief justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name.

Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton, and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staunforde, with some others of ancient date; whose treatises are cited as authority, and are evi-

dences that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the same learned judge we have just mentioned, sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton, in the reign of Edward the Fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method. The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts.

And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

II. The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs, out of which the common law, as it now stands, was collected at first by king Alfred, and afterwards by king Edgar and Edward the Confessor; each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, boroughs, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradiction to the rest of the nation at large; which privilege is confirmed to them by several acts of parliament.

III. The third branch are those peculiar laws which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.

It may seem a little improper at first view to rank these laws under the head of *leges non scriptæ*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of sir Matthew Hale, because it is most plain, that it is not on account of their being written laws, that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors, were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognise any foreign power as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest of its subjects. But all the strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptæ*, or customary laws; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law.

By the "CIVIL LAW," absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law,—founded first upon the regal constitution of their ancient kings, next upon the twelve tables of

the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors,—had grown to so great a bulk, as Livy expresses it, "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Justinian. This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled, A. D. 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe, till many centuries after; and to this it is probable that the Frank and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 529.

This consists of, 1. The institutes, which contain the elements or first principles of the Roman law, in four books. 2. The digests, or pandects, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code of Theodosius imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which however fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy: which accident, concurring with the policy of the Roman ecclesiastics, suddenly gave new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

The "CANON LAW" is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see. All which lay in the same disorder and confusion as the Roman civil law; till, about the year 1151, one Gratian an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books; which he entitled *Concordia Discordantium Canonum*, but which are generally known by the name of *Decretum Gratiani*. These reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX. were published in much the same method under the auspices of that pope, about the year 1230, in five books; entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface VIII. about the year 1298, which is called *Sextus Decretalium*. The Clementine Constitutions, or decrees of Clement V. were in like manner authenticated in 1317, by his successor John XXII.; who also published twenty constitutions of his own, called the *Extravagantes Joannis*: all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *extravagantes communes*. And all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the *Corpus Juris Canonici*, or body of the Roman canon law.

Besides these pontifical collections, which during the times of popery were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church and kingdom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from pope Gregory IX. and pope Clement IV. in the reign of king Henry III. about the years 1229 and 1268. The provincial constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the reign of Henry III. to Henry

Chichele in the reign of Henry V.; and adopted also by the province of York in the reign of Henry VI. At the dawn of the reformation, in the reign of king Henry VIII. it was enacted in parliament that a review should be had of the canon law; and, till such a review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

There are four species of courts, in which the civil and canon laws are permitted, under different restrictions, to be used. 1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law courts christian, *curiæ christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty, 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by act of parliament, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.

1. And, first, the courts of common law have the superintendency over these courts, to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and in case of contumacy, to punish the officer who executes, and, in some cases, the judge who enforces, the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament as concern, either the extent of these courts, or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the kings, court at Westminster will grant prohibitions to restrain and controul them.

3. An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt, that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege*; and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.

Let us next proceed to the *leges scriptæ*, the written laws of the kingdom, which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and common, in parliament assembled. The oldest of these now extant, and printed in our statute books, is the famous *Magna Charta*, as confirmed in parliament 9 Henry III.: though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments.

- Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. And this upon a general principle of universal law; that "*leges posteriores priores contrarias abrogant*:" consonant to which it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto*."

These are the several grounds of the laws of England: over and above which, **EQUITY** is also frequently called in to assist, to moderate, and to explain them.

Besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind, there are also peculiar courts of equity established for the benefit of the subject; to detect latent frauds and concealments, which

the process of the courts of law is not adapted to reach ; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognisable in a court of law ; to deliver from such dangers as are owing to misfortune of oversight ; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of our courts of equity, which however are only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer more punishment than the law assigns, but he may suffer less. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant ; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.

QUESTIONS.

What are the two kinds into which the municipal law of England is divided ?

What does the *lex non scripta* include ?

Where are the evidences and monuments of our legal customs to be looked for ?

What is the force and reason of the expression "*leges non scriptæ* ? "

What does Lord Bacon say about the mixed character of our laws ?

Did Alfred do anything towards collecting together the customs and laws of the country ? What did he do ?

What caused the code of Alfred to fall into disuse ?

What were the three systems of law prevailing in this country about the beginning of the eleventh century ?

What was the *Meroen lage* ?—*The West Saxon lage* ?—*The Dane lage* ?

Who reduced them into one uniform code or digest of laws ?

To whom are the titles "*Legum Anglicanarum conditor*" and "*Legum Anglicanarum restitutor*" applied, and why ?

What is the origin of the COMMON LAW ?

On what does the validity of a *custom* depend ?

How many kinds are there of the *lex non scripta*, or common law ?

Explain what is a general custom, and a particular custom ?

Who ascertains and decides upon the validity of these customs and maxims ?

How are judicial decisions preserved ?

What are *precedents* ?

What is the doctrine of the law concerning the following precedents ?

What are Records ? What are "Reports ?"

Who was Coke ? What is the character of his legal writings ?

How are particular customs perpetuated, and why ?

What is the third branch of the *leges non scriptae* ?

How do the civil and canon law form a part of the *leges non scriptae* ?

What is the civil law ? What was its origin ?

What did Livy say concerning its bulk ?

What was the Theodosian code, and when was it drawn up, and where was it in force ?

When was the present body of civil law compiled, and by whose order ?

What are the "Institutes ?" The "Digests, or Pandects ?" The "New code ?" The "Novels ?"

What became of the code of Justinian ?

When, and where, and under what circumstances did the civil law suddenly revive ?

• What is the canon law ?

On what does the authority of the canon law depend ?

In what courts are the civil and canon laws permitted to be used in England.

How do the great common law courts controul the courts where the civil and canon law is used ?

What is the *lex scripta*, and what does it include ?

What is the oldest statute extant ?

If a statute differs from the common law, which prevails, and on what principle ?

What are the functions and duties of courts of equity ?

ON THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

THE kingdom of England, over which our municipal laws have jurisdiction, includes not, *by the common law*, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

Wales had continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for many centuries: even from the time of the hostile invasions of the Saxons, when the ancient and christian inhabitants of the island retired to those natural intrenchments, for protection from their pagan visitants. But when these invaders themselves were converted to christianity, and settled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were over-run by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England: till at length, in the reign of Edward the First, who may justly be styled the conqueror of Wales, the line of their ancient princes, was abolished, and the king of England's eldest son became as a matter of course, their titular prince; the territory of Wales being then entirely re-annexed, by a kind of feudal resumption, to the dominion of the crown of England; or, as the statute of Rhudlan expresses it, "*terra*

Walliæ cum incolis suis, prius regi jure feodali subjecta, (of which homage was the sign,) jam in proprietatis dominium totaliter et cum integritate conversa est, et coronæ regni Angliæ tanquam pars corporis ejusdem annexa et unita." By the statute also of Wales, very material alterations were made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings: but they still retained very much of their original polity; particularly their rule of inheritance, viz. that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still farther abridged: but the finishing stroke to their independency was given by the statute 27 Hen. VIII. c. 26, which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the Republic of Rome practised with great success, till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

It is enacted by this statute 27 Hen. VIII. 1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no other, shall be used in Wales: besides many other regulations of the police of this principality. And the statute 34 and 35 Hen. VIII. c. 26. confirms the same, adds farther regulations, divides it into twelve shires, and, in short, reduces it into the same order in which it stands at this day; differing from the kingdom of England in only a few particulars, hardly more than are to be found in many counties of England itself*.

* A statute passed in the year 1831, (1 W. 4. c. 70), which abolished the local courts previously existing in Wales, completed the assimilation of that part of the kingdom to England.

The kingdom of Scotland, notwithstanding the union of the crowns on the accession of their king James VI. to that of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity, in their laws. By an act of parliament, 1 Jac. I. c. 1. it is declared that these two mighty, famous, and ancient kingdoms were formerly one. And sir Edward Coke observes how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent of the crown, their parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same; especially as their most ancient and authentic book, called *regiam majestatem*, and containing the rules of their ancient common law, is extremely similar to that of Glanvil, which contains the principles of ours, as it stood in the reign of Henry II. And the many diversities subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms.

However, Sir Edward Coke, and the politicians of that time, conceived great difficulties in carrying on the projected union: but these were at length overcome, and the great work was happily effected in 1707, 5 Anne; when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable being as follows:—

1. That on the first of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*l.* by a land-tax, Scotland shall raise 48,000*l.*

16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdoms.

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force: though alterable by the parliament of Great Britain. Yet with this caution: that laws relating to public policy are alterable at the discretion of the parliament: laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

22. Sixteen peers are to be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the house of commons*.

23. The sixteen peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers except sitting in the house of lords, and voting on the trial of a peer.

These are the principal of the twenty-five articles of union, which are ratified and confirmed by the statute 5 Ann. c. 8. in which statute there are also two acts of parliament recited; the one of Scotland, whereby the church of Scotland and also the four universities of that kingdom are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Ann. c. 6. whereby the acts of uniformity of 13 Ediz. and 13 Car. II. except as the same had been altered by parliament at that time, and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated that every subsequent king and queen shall take an oath in-

* But now by Statute 2, & 3, W. IV. cap. 65, passed in the year 1832, the number of Scottish members is 53: viz. 30 for counties and 23 for towns.

violably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed. And it is enacted, that these two acts "shall be for ever observed as fundamental and essential conditions of the union."

The town of Berwick-upon-Tweed was originally part of the kingdom of Scotland; and, as such, was for a time reduced by king Edward I. into the possession of the crown of England: and during such its subjection, it received from that prince a charter, which, after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England, was confirmed by king Edward III., with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is, before its reduction by Edward I. Its constitution was new-modelled, and put upon an English footing by a charter of king James I.; and all its liberties, franchises, and customs, were confirmed in parliament by the statutes 22 Ed. IV. c. 8. and 2 Jac. I. c. 28. Though therefore it hath some local peculiarities, derived from the ancient law of Scotland, yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts in the British parliament, whether specially named or otherwise.

As to Ireland, the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons. But king John in the twelfth year of his reign went into Ireland, and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England: which letters patent sir Edward Coke apprehends to have been there confirmed in parliament. But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the third and Edward the first were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III. under Lionel duke of Clarence, the then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of queen Eliza-

beth, the wild natives kept and preserved their Brehon law; which is described to have been "a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great shew of equity in determining the right between party and party, but in many things repugnant quite both to God's laws and man's." The latter part of this character alone is ascribed to it, by the laws before cited of Edward the first and his grandson.

But as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed, that though the immemorial customs, or common law of England, were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of King John, extended into that kingdom; unless it were specially named, or included under general words, such as, "within any of the king's dominions."

But the Irish nation being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted, by Poynings' laws*, that all acts of parliament, *before* made in England, should be of force within the realm of Ireland†.

* Made in the 10th year of Henry VII. and called after Sir Edward Poynings, then Lord Deputy.

† Ireland has since been united to Great Britain by statute 39, and 40 G. 3. cap. 67, which incorporates the two into "The United Kingdom of Great Britain and Ireland." The chief articles of the Union are as follows:—

Art. I. Provides, that the kingdoms of Great Britain and Ireland shall, on the 1st day of January 1801, and for ever after, be united into one kingdom, by the name of The United Kingdom of Great Britain and Ireland.

Art. II. Provides, that the succession to the crown shall continue settled as before limited.

Art. III. Provides, that there shall be one parliament, styled, The Parliament of the United Kingdom of Great Britain and Ireland.

Art. IV. Provides, that four lords spiritual of Ireland, by rotation of sessions, and twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, shall sit in the House of Lords; and one hundred commoners two for each county, two for the city of Dublin, and two for the city of Cork, one for Trinity college, and one for each of the thirty-one

With regard to the other adjacent islands which are subject to the crown of Great Britain, some of them, as the

most considerable cities and boroughs, shall be the number to sit in the House of Commons on the part of Ireland.

That a peer of Ireland, not elected one of the twenty-eight, may sit in the House of Commons; but that whilst he continues a member of the House of Commons, he shall not be entitled to the privilege of peerage, nor capable of being elected one of the twenty-eight peers, nor of voting at such election, and he shall be sued and indicted for any offence as a commoner.

That as often as three of the peerages of Ireland, existing at the time of the Union, shall become extinct, the king may create one peer of Ireland; and when the peers of Ireland are reduced to one hundred by extinction, or otherwise, exclusive of those who shall hold any peerage of Great Britain subsisting at the time of the Union, or created of the united kingdom since the Union, the king may then create one peer of Ireland for every peerage that becomes extinct, or as often as any one of them is created a peer of the united kingdom, so that the king may always keep up the number of one hundred Irish peers, over and above those who have an hereditary seat in the House of Lords.

That the qualifications by property of the representatives in Ireland, shall be the same respectively as those for counties, cities, and boroughs in England, unless some other provision be afterwards made.

That all the lords of parliament on the part of Ireland, spiritual and temporal, sitting in the House of Lords, shall have the same rights and privileges respectively as the peers of Great Britain; and that all the lords spiritual and temporal of Ireland, shall have rank and precedency next and immediately after all the persons holding peerages of the like order and degree in Great Britain, subsisting at the time of the Union; and that all peerages hereafter created of Ireland, or of the united kingdom, of the same degree, shall have precedency according to the dates of their creations; and that all the peers of Ireland, except those who are members of the House of Commons, shall have all the privileges of peers as fully as the peers of Great Britain, the right and privileges of sitting in the House of Lords, and upon the trial of peers, only excepted.

Art. V. Provides, that the churches of England and Ireland shall be united into one protestant episcopal church, to be called The United Church of England and Ireland; that the doctrine and worship shall be the same; and that the continuance and preservation of the united church as the established church of England and Ireland, shall be deemed an essential and fundamental part of the Union; and that in like manner the church of Scotland shall remain the same as is now established by law, and by the acts of union of England and Scotland.

Art. VI. Provides, that the subjects of Great Britain and Ireland shall be entitled to the same privileges with regard to trade and navigation, and also in respect of all treaties with foreign powers.

That all prohibitions and bounties upon the importation of merchandize from one country to the other shall cease.

But that the importation of certain articles therein enumerated, shall be subject to such countervailing duties as are specified in the act.

isle of Wight *, of Portland, of Thanet, &c. are comprised within some neighbouring county, and are therefore to be looked upon as annexed to the mother island, and part of the kingdom of England. But there are others which require a more particular consideration.

And, first, **THE ISLE OF MAN** is a distinct territory from England, and is not governed by our laws: neither doth any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there. It was formerly a subordinate, feudatory kingdom, subject to the kings of Norway; then to king John and Henry III. of England; afterward to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV. claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted, by the name of the lordship of Man, to sir John de Stanley by letters patent 7 Henry IV. In his lineal descendants it continued for eight generations, till the death of Ferdinando earl of Derby, A.D. 1594: when a controversy arose concerning the inheritance thereof, between his daughter and William his surviving brother; upon which, and a doubt that was started concerning the validity of the original patent, the island was seized into the queen's hands, and afterwards various grants were made of it by king James the First; all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James

Art. VII. Provides, that all the laws and courts of each kingdom shall remain the same as they are now established, subject to such alterations by the united parliament as circumstances may require; but that all writs of error and appeals shall be decided by the House of Lords of the united kingdom, except appeals from the court of admiralty in Ireland, which shall be decided by a court of delegates appointed by the court of chancery in Ireland.

Statute 2 & 3 W. IV. cap. 88. (passed in the year 1832), gave five additional members to Ireland, one to each of the following places, viz:—Limerick, Waterford, Belfast, Galway, and the University of Dublin.

* The isle of Wight is severed from the county of Hants, and made a separate county for the purpose of returning a member to Parliament, by 2 William IV., c. 45, sec. 16.

earl of Derby, A.D. 1735, the male line of earl William failing, the Duke of Atholl succeeded to the island as heir general by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting or dissenting to laws, and exercising an appellate jurisdiction. Yet, though no English writ, or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council. But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, it affording a commodious asylum for debtors, outlaws, and smugglers, authority was given to the treasury by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26. and 39, whereby the whole island and its dependencies so granted as aforesaid, except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of the bishoprick and other ecclesiastical benefices, are unalienably vested in the crown, and subjected to the regulations of the British excise and customs.

The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an ancient book of very great authority, entitled, *le grand coutumier*. The king's writ, or process from the courts of Westminster, is there of no force; but his commission is. They are not bound by common acts of our parliaments, unless particularly named. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king and council, in the last resort.

Besides these adjacent islands, our most distant plantations in America, and elsewhere, are in some respect subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only,—by finding them desert and uncultivated, and peopling them from the mother country;

or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, such especially as are enforced by penalties, the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance, by their own provincial judicature, subject to the revision and controul of the king in council: the whole of their constitution being also liable to be new modelled and reformed by the general superintending power of the legislature of the mother country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.

We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in the ensuing commentaries. And this comprehends not only Wales and Berwick, of which enough has been already said, but also part of the sea. The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shewn hereafter; but they are not subject to the common law. This main sea begins at the low-water mark; but between the high-water mark, and the

low-water mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, an alternate jurisdiction; one upon the water, when it is full sea; the other upon the land, when it is an ebb.

The territory of England is liable, to two divisions: the one ECCLESIASTICAL, the other CIVIL.

1. The *Ecclesiastical* division is, primarily, into two *Provinces*, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffraganⁱ bishops; whereof Canterbury includes twenty-one, and York three: besides the bishoprick of the Isle of Man, which was annexed to the province of York, by king Henry VIII. Every diocese is divided into archdeaconries, whereof there are sixty, in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes.

A parish is *that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein*. These districts are computed to be near ten thousand in number. How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed, on all hands, that in the early ages of Christianity in this island, parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion.

Mr. Camden says, England was divided into parishes by Archbishop Honorius, about the year 630. Sir Henry Hobart lays it down, that parishes were first erected by the council of Lateran, which was held A.D. 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the

i. e. Subordinate to an archbishop.

medium between the two extremes. For Mr. Selden has clearly shewn, that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of king Edgar, about the year 970. Before that time the consecration of tithes was in general arbitrary; that is, every man paid his own, as was before observed, to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was now ordered by the law of king Edgar, that "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.*" However, if any thane, or great lord, had a church, within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister: but if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case all his tithes were ordained to be paid to the *primariæ ecclesiæ* or mother-church.

This proves that the kingdom was then generally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors: since it very seldom happens, that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes, or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough account for the frequent

intermixture of parishes one with another. For, if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extraparochial; and their tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence that he will distribute them for the general good of the church: yet extraparochial wastes and marsh-lands, when improved and drained, are by the statute 17 Geo. II. c. 37, to be assessed to all parochial rates in the parish next adjoining. And thus much for the ecclesiastical division of this kingdom.

2. The *Civil* division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, seems to owe its original to king Alfred: who, to prevent the rapines and disorders which formerly prevailed in the realm, instituted tithings; so called from the Saxon, because *ten* freeholders with their families composed one. They all dwelt together, and were sureties or free pledges to the king for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming. And therefore anciently no man was suffered to abide in England above forty days, unless he were enrolled in some tithing or decenary. One of the principal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithing-man, the headborough (words which speak their own etymology),* and in some countries the borsholder, or borough's ealder, being supposed the discreetest man in the borough, town, or tithing.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by an high constable or bailiff, and formerly

there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes.

An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman, as the Saxons called him, of the shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve, or shire-reve, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes, in Sussex, each of them containing about three or four hundreds a-piece. These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into three of these intermediate jurisdictions, they are called trithings, which were anciently governed by a trithing reeve. These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west-riding. The number of counties in England and Wales have been different at different times; at present they are forty in England, and twelve in Wales.

Three of these counties, Chester, Durham, and Lancaster, are called counties palatine. The two former are such by prescription, or immemorial custom; or, at least, as old as the Norman conquest; the latter was created by king Edward III. in favour of Henry Plantagenet, first earl and then duke of Lancaster; whose heiress being married to John of Gant, the king's son, the franchise was greatly enlarged and confirmed in parliament, to honour John of Gant himself, whom, on the death of his father-in-law, the king had also created duke of Lancaster. Counties palatine are so called *a palatio*; because the owners thereof, the earl of Chester, the bishop of Durham, and the duke of Lancaster, had in those counties *jura regalia*, as fully as the king hath in his palace; *regalem potestatem in omnibus*, as Bracton expresses it.

There are also counties *corporate*: which are certain

cities and towns, some with more, some with less territory annexed to them; to which out of special grace and favour the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Coventry, and many others. And thus much of the countries subject to the laws of England.

QUESTIONS.

What does the *Kingdom of England* include, according to the common law?

Which of our kings is stiled the *conqueror of Wales*?

How did the title of Prince of Wales arise?

In what king's reign was the independence of Wales finally destroyed, and how? State the general objects and provisions of the statute 27th Henry VIII. c. 26.

When were the local courts of Wales abolished?

When did the union of the Scottish and English crowns take place?

What was the opinion of Lord Coke concerning the laws of Scotland?

When was the union between Scotland and England effected?

State the chief of the twenty-five articles of union?

What is the history of Berwick upon Tweed? How is it governed?

As to Ireland, what was the *Brehon law*?

What part did king John act with regard to Ireland?

What were "Poyning's laws"?

When did the union of Ireland and great Britain take place?

How are the Isle of Wight, of Portland, of Thanet governed?

Is the Isle of Man governed by our laws?

State the chief points of the history of the Isle of Man.

How are the Islands of Jersey, Guernsey, Sark, Alderney, and their appendages, governed?

How are our Plantations or Colonies governed?

What are the three kinds of Colonies?

Does the kingdom of England comprehend any part of the Sea?

Who have jurisdiction on the High Seas?

What part of the sea is subject to the common law, and what part to the jurisdiction of the court of Admiralty?

What are the two great divisions of the territory of England?

What are the sub-divisions of the Ecclesiastical division?

What is a Province? A Diocese? An Arch-Deaconry? A Rural Deanery?

What is a Parish? How many are there?

When are parishes supposed to have been adopted?

State the progress of parishes, and the endowment of parish churches?

How do you account for the intermixture of parishes one with another?

What are the subdivisions of the civil divisions of England? State and explain them?

Who originated this division, and why?

What is a *shire*, and what a *county*? And from what derived?

What is the origin and meaning of the *Ridings* of Yorkshire?

What is a county Palatine.

THE ABSOLUTE RIGHTS OF INDIVIDUALS GENERALLY.

As municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or as Cicero, and after him our Bracton, have expressed it, *sanctio justa, iubens honesta et prohibens contraria*; it follows, that the primary and principal objects of the law are *rights* and *wrongs*. Adopting this very simple and obvious division, let us, in the first place, consider the rights that are commanded, and secondly, the wrongs that are forbidden, by the laws of England.

RIGHTS are, however, liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the rights of persons; or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are styled *jura rerum*, or the rights of things. WRONGS are also divisible into, first, private wrongs, which, being an infringement merely of particular rights, concern individuals only, and are called 'civil injuries;' and secondly, public wrongs, which, being a breach of general public rights, affect the whole community, and are called 'crimes' and 'misdemeanors.'

The rights of persons that are commanded to be observed by the municipal law are of two sorts: first, such as are *due from every citizen*, which are usually called civil duties; and secondly, such as *belong to him*, which is the more popular acceptation of the rights or *jura*. Both may indeed be comprised in this latter division; for as all social duties are of a relative nature, at the same time that they are due from one man, or set of men, they must also be due to another. But I apprehend it will be more clear and easy

to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are reciprocally, the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

Persons also are divided by the law into either natural persons or artificial. *Natural* persons are such as the *God* of nature formed us; *artificial* persons are such as are created and devised by human laws for the purposes of society and government, and which are called "corporations" or "bodies politic."

The rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. *Absolute*, which are such as appertain and belong to particular men, merely as individuals or single persons: *relative*, which are incident to them as members of society, and standing in various relations to each other.

By the *absolute rights of individuals* we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute duties which man is bound to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of *human* laws. But if he makes his vices public, though they be such as principally affect himself, as drunkenness or the like, they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. Public sobriety is a relative

duty, and therefore enjoined by our laws; private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore, they can never enforce it by any civil sanction. But with respect to rights, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of social and friendly communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human law is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and, with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated *the natural liberty of mankind*. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or controul, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society, gives up a part of

his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment, would wish to obtain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. *Political* therefore, or *civil liberty*, which is that of a member of society, is no other than *natural liberty so far restrained by human laws, and no farther, as is necessary and expedient for the general advantage of the public*. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of indifference, without any good end in view, are regulations destructive of liberty; whereas, if any public advantage can arise from observing such precepts, the controul of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence.

The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner; the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing, even in the meanest subject. Very different, from the modern constitutions of other states, on the continent of Europe, and from the genius of the imperial law: which in general ~~are~~ calculated to vest an arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply

implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman.

QUESTIONS.

What are the objects of the municipal laws of England ?

How many kinds of rights are there ? 'Of wrongs ?

What are the "*rights of persons* ? " The "*rights of things* ? "

What is the distinction between 'civil injuries, and crimes and misdemeanors ?

What do you mean by "allegiance" and "protection" in the sense of rights and duties ?

How many kinds of "persons" are there in legal contemplation ?

What do you mean by an *artificial person* ? A *natural person* ?

What is the distinction between *absolute*, and *relative* rights ?

What kind of duties are they that *human* laws regulate ?

What is the difference between private and public rights with reference to the laws ?

How are absolute and *relative rights* affected by the laws ?

What do you understand by the expression "*Natural liberty of mankind* ? "

What is the meaning of "Civil Liberty ? "

Give an instance of the extent to which civil liberty flourishes in Great Britain ?

ON THE ABSOLUTE RIGHTS OF THE INHABITANTS OF GREAT BRITAIN.

THE Absolute rights of every Englishman, which, taken in a political and extensive sense, are usually called their liberties, as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment, excellent as it is, being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; *and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger—*

First, by the great charter of liberties*, which was obtained, sword in hand, from king John, and afterwards, with some alterations, confirmed in parliament by King Henry III. his son. Which charter contained very few new grants; but, as Sir Edward Coke observes, was for the most part *declaratory of the principal grounds of the fundamental laws of England*. Afterwards by the statute called *confirmatio cartarum*, whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed, or counsel, act contrary thereto, or in any

* Magna Charta.

degree infringe it. Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two), from the first Edward to Henry the Fourth. Then, after a long interval, by the *petition of right*: which was a parliamentary declaration of the liberties of the people, assented to by king Charles the First, in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the Second. To these succeeded the *bill of rights*, or declaration delivered by the lords and commons to the prince and princess of Orange, 13th February, 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words; "and they do claim, demand, and insist upon, all and singular the premises, as their undoubted rights and liberties." And the act of parliament itself recognises "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient, and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the present century*, in the *act of settlement*, whereby the crown was limited to his present majesty's illustrious house; and some new provisions were added, at the same fortunate æra, for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law.

Thus much for the DECLARATION of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical

* The eighteenth century.

manner, the rights of the people of England. And these may be reduced to three principal or primary articles: the right of *personal security*, the right of *personal liberty*, and the right of *private property*; because, as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. The right of **PERSONAL SECURITY** consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

Both the life and limbs of a man are of such high value in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion.

These rights, of life and member, can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society; and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate; the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations. A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate.

3. Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by

the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding, though such insults amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and,

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right.

II. Next to personal security, the law of England regards, asserts, and preserves the PERSONAL LIBERTY of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I., it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his counsel, have a writ of *habeas corpus* to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the *habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached,

no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2. c. 2, that excessive bail ought not to be required.

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorise the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica detrimenti capiat*," was called the *senatus consultum ultimæ necessitatis*. In like manner this expedient ought to be tried only in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever.

The confinement of the person in any wise is an imprisonment. So that the keeping a man against his will

in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement, that if a man is under duress of imprisonment, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, *in order to be examined into, if necessary, upon a habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect, saith Sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases, and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without licence. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England out of the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is, either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter declares, that no freeman shall be banished, unless by the judgment of his peers or by the law of the land. And by the *habeas corpus* act, Car. II. c. 2., (that second *magna carta* and stable bulwark of our liberties,) it is enacted, that no subject of

this realm, who is an inhabitant of England, Wales or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas; where they cannot have the full benefit and protection of the common law; but that all such imprisonments shall be illegal; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers, and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though within the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man out of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might in reality be no more than an honourable exile.

III. The third absolute right, inherent in every Englishman, is that of **PROPERTY**: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. This original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against

the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none*.

So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases, the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament.

It was made an article in the petition of right, 3 Car. I.,

i. e. it shall be for nothing—be void.

that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And by the statute 1 W. and M. st. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the same is or shall be granted, is illegal.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

1. The constitution, powers, and privileges of parliament.

2. The limitation of the king's prerogative, by bounds, so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people. The former of these keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta* spoken in the person of the king, who in judgment of law, says sir Edward Coke, is ever present and repeating them in all his courts, are these, *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*: "and therefore every subject," continues the same learned author, "for injury done to him in bonis, in terris, vel persona, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely

without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the affirmative acts of parliament, wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament.

4. If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told that the czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen; liberties more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in a free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate,

the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigour: and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birth-right to enjoy entire; unless where the laws of our country have laid them under necessary restraints; restraints in themselves so gentle and moderate, as will appear upon farther inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow citizens. So that this review of our situation may fully justify the observation of a learned French author, Montesquieu, who indeed generally both thought and wrote in the spirit of genuine freedom; and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world where political or civil liberty is the direct end of its constitution.

QUESTIONS.

From whom was Magna Charta obtained, and how, and when? what did Henry the Third to the great charter?

What was the opinion of Lord Coke concerning Magna Charta?

What was the *confirmatio chartarum*? In what reign was it passed, and what did it enact?

What was the *Petition of Right*? And when passed?

In whose reign was the *Habeas Corpus* act passed?

What was the *Bill of Rights*? And when passed?

What was the *Act of Settlement*, and when passed?

What are the three grand Rights of Englishmen?

What is the right of personal security?

Is homicide justifiable, if committed in defence of a party's life and limbs?

What is the distinction between *civil* and *natural* death?

What is the right of personal liberty?

What does *Magna Charta* enact concerning personal liberty? And what does the *Habeas Corpus* act?

Who has the power of suspending the *Habeas Corpus* act, and what would be the effect of such suspension?

What was done in ancient Rome under similar emergencies?

What is requisite to make an *imprisonment* lawful?

What is the only way in which an Englishman can be sent away from the country against his will?

What do *Magna Charta* and the *Habeas Corpus* act enact concerning this?

What is the penalty attached to an infraction of these statutes?

Can the king make a man a lord lieutenant of Ireland, or an ambassador against his will?

What does *Magna Charta* enact concerning the right of personal property?

Could a new road be made through a person's grounds against his will? State the law of England on this point?

Who imposes taxes? What was provided concerning taxation in the petition of right?

What are the five auxiliary subordinate rights of the subject?

What does *Magna Charta* say as to the right of the subject to obtain a redress of injury in the courts of justice?

Has the subject the right to petition the king, or parliament, for the redress of grievances?

What was the opinion of Montesquien concerning the constitution of Great Britain?

ON THE CONSTITUTION OF THE BRITISH PARLIAMENT.

THE most universal public relation, by which men are connected together, is that^o of government; namely, as governors and governed, or, in other words, as magistrates and people. Of magistrates some also are supreme, in whom the sovereign power of the state resides; others are subordinate, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as a legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us, therefore, in England, this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone.—We will here consider the British Parliament; in which the legislative power, and, of course, the supreme and absolute authority of the state, is vested by our constitution.

Parliaments, or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed, is another question, which has been matter of great dispute among our learned antiquaries; and, particularly, whether the commons were summoned at all; or if summoned, at what period they began to form a distinct

assembly. It is not necessary, however, here to enter into controversies of this sort. I hold it sufficient, that it is generally agreed, that in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of king John, A. D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a certain place, with forty days' notice, to assess aids and scutages when necessary. And this constitution has subsisted in fact at least from the year 1266, 49 Hen. III. there being still extant writs of that date, to summon knights, citizens, and burgesses to parliament. I proceed, therefore, to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of at least five hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of its assembling; secondly, its constituent parts; thirdly, the laws and customs relating to parliament, considered as one aggregate body; fourthly and fifthly, the laws and customs relating to each house separately and distinctly taken; sixthly, the methods of proceeding, and of making statutes, in both houses; and lastly, the manner of the parliament's adjournment, prorogation, and dissolution*.

¶ As to the manner and time of assembling. The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council†, at least forty days‡ before it begins to sit. It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any except the king alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half

* These subjects will be comprised in several of the succeeding extracts.

† And directed to the lord chancellor, commanding him to issue under the great seal, such and so many writs as have been usual and customary, for the purpose of calling a new parliament.

‡ The period adopted is generally fifty days.

absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the parliament should be *called together* at a determinate time and place; and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts; and, of the three constituent parts, this office can only appertain to the king; as he is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no parliament is in being. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and is to sit again for six months, unless dissolved by the successor; for this revived parliament must have been originally summoned by the crown.

And this summons, by the ancient statutes of the realm, the king is bound to issue every year, or oftener, if need be. Not that he is, or ever was, obliged by these statutes to call a new parliament every year; but, only to permit a parliament to sit annually for the redress of grievances, and despatch of business, if need be. These last words are so loose and vague, that such of our monarchs as were inclined to govern without parliaments, neglected the convoking them sometimes for a very considerable period, under the pretence that there was no need of them. But to remedy this, by the statute 16 Car. II. c. 1, it is enacted, that the sitting and holding of parliaments shall not be intermitted above three years at the most. And by the statute 1 W. & M. st. 2. c. 2, it is declared to be one of the rights of the people, that for the redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held frequently. And this indefinite frequency is again reduced to a certainty by statute 6 W. & M. c. 2, which enacts, as the statute of Charles the Second had done before, that a new parliament shall be called within three years after the determination of the former*.

* So many important statutes would expire with the expiration of the year, unless renewed by parliament, that it is *practically* impossible to omit the assembling of that body annually.

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal, who sit, together with the king, in one house, and the commons, who sit by themselves in another. And the king and these three estates, together, form the great corporation or body politic of the kingdom, of which the king is said to be *caput, principium, et finis*. For upon their coming together the king meets them, either in person or by representation; without which there can be no beginning of a parliament; and he also has alone the power of dissolving them.

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the First, while it acted in a constitutional manner with the royal concurrence, redressed many heavy grievances, and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder therefore any such encroachments, the king is himself a part of the parliament; and, as this is the reason of his being so, very properly, therefore, the share of legislation, which the constitution has placed in the crown, consists in the power of rejecting rather than resolving; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong, but merely of preventing wrong from being done. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and assented to by the two houses. The legislative therefore,

cannot abridge the executive power of any rights which it now has, by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved; while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct, not indeed of the king, which would destroy his constitutional independence; but, which is more beneficial to the public, of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest; for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. *Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.*

Let us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The king's majesty will be considered at large hereafter.

The next in order are the spiritual lords. These consist of two archbishops, and twenty-four bishops*; and at the dissolution of monasteries by Henry VIII. consisted likewise of twenty-six mitred abbots, and two priors: a very considerable body, and in those times equal in number to the temporal nobility. And these hold, or are supposed to hold, certain ancient baronies under the king: for William

* And since the Union four Irish Lords Spiritual by rotation of session

the Conqueror thought proper to change the spiritual tenure of frankalmoign or free alms, under which the bishops held their lands during the Saxon government, into the feudal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt: and in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the house of lords. But though these lords spiritual are in the eye of the law a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of the lords; they intermix in their votes; and the majority of such intermixture binds both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued very cogently, that the lords spiritual and temporal are now in reality only one estate: which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues. For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it; of which Selden and Sir Edward Coke give many instances: as, on the other hand, I presume it would be equally good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill; though Sir Edward Coke seems to doubt whether this would not be an ordinance, rather than an act, of parliament.

The lords temporal consist of all the peers of the realm, (the bishops not being in strictness held to be such, but merely lords of parliament,) by whatever title of nobility distinguished; dukes, marquises, earls, viscounts, or barons: of which dignities we shall speak more hereafter. Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland, by election, which is the case of the sixteen peers, who represent the body of the Scots nobility*. Their number is indefinite, and may be increased at will by the power of the crown: and once, in the reign of queen Anne, there was an instance of creating no less than twelve together;

* And since the Union twenty-eight Irish peers. The Scotch peers are elected only for one parliament, the Irish peers for life.

in contemplation of which, in the reign of king George the first, a bill passed the house of lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the constitution, by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new-created lords. But the bill was ill-relished, and miscarried in the house of commons, whose leading members were then desirous to keep the avenues to the other house as open and easy as possible.

The commons consist of all such men of property in the kingdom, as have not seats in the house of lords; every one of whom has a voice in parliament, either personally or by his representatives. In a free state, every man who is supposed a free agent, ought to be, in some measure, his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus, when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter; and, from that time, all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours, it is therefore very wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights elected by the proprietors of lands: the cities and boroughs are represented by citizens and burgesses chosen by the mercantile part, or supposed trading interests of the nation. And every member, though chosen by one particular district,

when elected and returned, serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the common-wealth; to advise his majesty, as appears from the writ of summons, "*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, et defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus.*" And therefore, he is not bound, like a deputy in the United Provinces, to consult with, or take the advice of, his constituents, upon any particular point, unless he himself thinks it proper or prudent so to do*.

These are the constituent parts of a parliament; the king, the lords spiritual and temporal, and the commons: parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two, only, of the three, is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in the times of madness and anarchy, the commons once passed a vote, "that whatever is enacted or declared

* The following memorable passage occurs in the celebrated Edmund Burke's "Speech at the conclusion of the poll" on the occasion of his being elected a member of parliament for Bristol.

"Parliament is not a congress of ambassadors from different and hostile interests, and which interests each must maintain as an agent and advocate, against other agents and advocates; but parliament is a **DELIBERATIVE** assembly, of *one* nation, with *one* interest—that of the whole:—where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member, indeed; but when you have chosen him, he is not member of Bristol, but he is a *member of parliament*. If the local constituent should have an interest, or should form a hasty opinion, evidently opposite to the real good of the rest of the community, the member for that place ought to be as far as any other from any endeavour to give it effect. We are now members for a rich commercial city; this city, however, is but a part of a rich commercial NATION, the interests of which are various, multiform, and intricate. *We are members for that great nation*—which, however, is itself but part of a great empire extended by our virtue and our fortunes to the furthest limits of the East and of the West. All these wide spread interests must be considered; must be compared; must be reconciled, if possible. We are members for a FREE country; and surely we all know that the machine of a free constitution is no simple thing; but as intricate, and as delicate, as it is valuable. We are members in a great and ancient MONARCHY—and we must preserve religiously, the true legal rights of the sovereign, which form the key-stone that binds together the noble and well-constructed arch of our empire and our constitution."

for law by the commons in parliament assembled, hath the force of law; and all the people of this nation are concluded thereby, although the consent and concurrence of the king or house of peers be not had thereto;” yet, when the constitution was restored in all its forms, it was particularly enacted by statute 13 Car. II. c. 1, that “if any person shall maliciously or advisedly affirm, that both, or either of the houses of parliament, have any legislative authority without the king, such person shall incur all the penalties of a *præmunire* *.

QUESTIONS.

What is the chief characteristic of all tyrannical governments?

Where is the legislative and executive authority vested in the British constitution?

In what year, and in what king's reign may the present constitution of Parliament be considered as having been first established?

How is the Parliament summoned?

Why cannot the Parliament meet spontaneously?

How often is the King obliged to call Parliament together?

What are the constituent parts of a Parliament?

What would be the practical ill consequences of the legislative assuming to itself the functions of the executive power? How was this illustrated in the reign of Charles I.?

What is the nature of the King's power, as a part of Parliament?

How do the king, the nobility, and the people, through the Parliament, act upon one another?

•What is the illustration drawn from mechanics?

How many Lords Spiritual are there?

How are they supposed to have been introduced into parliament?

How are the Irish and Scotch temporal peers elected, and how many are there of each?

What is the general idea of the representative principle in Great Britain?

What are the functions of a person chosen a member of parliament?

Can any law be passed without the consent of the King, Lords, and Commons?

These are, civil incapacity, and perpetual imprisonment.

THE POWERS AND PRIVILEGES OF PARLIAMENT.

THE power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. *All mischiefs and grievances, operations, and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal.* It can regulate or new-model the succession to the crown; as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land: as was done in a variety of instances, in the reigns of king Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible to be done; and therefore, some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of the great lord treasurer Burleigh, "that England could never be ruined but by a parliament;" and as Sir Matthew Hale observes, this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if

by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy.

In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper, to manage it, it is provided by the custom and law of parliament, that no one shall sit or vote in either house, unless he be twenty-one years of age. This is also expressly declared by statute 7 & 8 W. III. c. 25, with regard to the house of commons; doubts having arisen from some contrary adjudications, whether or not a minor was incapacitated from sitting in that house. It is also enacted by statute 7 Jac. I. c. 6, that no member be permitted to enter into the house of commons till he hath taken the oath of allegiance before the lord steward or his deputy: and by 30 Car. II. st. 2, and 1 Geo. I. c. 13, that no member shall vote or sit in either house, till he hath in the presence of the house taken the oath of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass *. Aliens, unless naturalised, were likewise by the law of parliament incapable to serve therein: and now it is enacted, by statute 12 & 13 W. III. c. 2, that no alien, even though he be naturalised, shall be capable of being a member of either house of parliament. And there are not only these standing incapacities; but if any person is made a peer by the king, or elected to serve in the house of commons by the people, yet may the respective houses, upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member; and this by the law and custom of parliament.

For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti*. The whole of this law and custom of parliament has its original from this one maxim, "that whatever matter arises concerning

* These provisions are dispensed with in favour of his Majesty's Roman Catholic subjects, by st. Geo. IV. c. 7 which is intitled "An Act for the Relief of his Majesty's Roman Catholic Subjects."

either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere." Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a Burgess; nor will either house permit the subordinate courts of law to examine the merits of either case. But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws.

The privileges of parliament are likewise very large and indefinite. And therefore when in 31 Henry VI, the house of lords propounded a question to the judges concerning them, the chief justice, Sir John Fortescue, in the name of his brethren, declared, "that they ought not to make answer to that question; for it hath not been used aforetime that the justices should in anywise determine the privileges of the high court of parliament. For it is so high and mighty in its nature, that it may make law: and that which is law it may make no law: and the determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices." Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the crown. If therefore all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite. Some however of the more notorious privileges of the members of either house are, privilege of speech, of person, of their domestics, and of their lands and goods. As to the first, privilege of speech, it is declared by the statute 1 W. & M. st. 2, c. 2, as one of the liberties of the people, "that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." And this freedom of

speech is particularly demanded of the king, in person, by the speaker of the house of commons, at the opening of every new parliament. So likewise are the other privileges, which included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still, to assault by violence a member of either house, is a high contempt of parliament. Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law in matters of civil right are now at an end, save only as to the freedom of the member's person; which in a peer, by the privilege of peerage, is for ever sacred and inviolable; and in a commoner, by the privilege of parliament, for forty days after every prorogation, and forty days before the next appointed meeting: which is now in effect as long as the parliament subsists; it seldom being prorogued for more than fourscore days at a time. As to all other privileges, which obstruct the ordinary course of justice, they were restrained by the statutes 12 W. III. c. 3, and 3 Ann. c. 18, and 11 George II. c. 24, and are now totally abolished by statute 10 Geo. III. c. 50, which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by any pretence of any such privilege; except that the person of a member of the house of commons shall not thereby be subjected to any arrest or imprisonment. Likewise, for the benefit of commerce, it is provided by statute 4 Geo. III. c. 33, that any trader, having privilege of parliament, may be served with legal process for any just debt to the amount of 100*l.*, and unless he make satisfaction within two months, it shall be deemed an act of bankruptcy; and that commissions of bankrupt may be issued against such privileged traders, in like manner as against any other*.

The claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or as it hath

* This statute has ceased to be of force, but very similar provisions are contained in statute 6 Geo. IV. c. 16; and 2 W. IV. c. 39. See an account of them in *Smith's Mercantile Law*, p. 362.

been frequently expressed, of treason, felony, and breach, or surety, of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families, or servants, in any crime whatsoever: and instances have not been wanting, wherein privileged persons have been convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session; which proceeding has afterwards received the sanction and approbation of parliament. To which may be added, that a few years ago, the case of writing and publishing seditious libels was resolved by both houses, not to be entitled to privilege; and that the reasons upon which that case proceeded extended equally to every indictable offence. So that the chief, if not the only privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained.

The laws and customs relating to the house of lords in particular, will take up but little of our time. They have a right to be attended, and constantly are, by the judges of the court of king's bench and common pleas, and such of the barons of the exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings. The secretaries of state, with the attorney and solicitor general, were also used to attend the house of peers, and have to this day, together with the judges, &c. their regular writs of summons issued out at the beginning of every parliament, *ad tractandum et consilium impendendum*, though not *ad consentiendum*; but, whenever of late years they have been members of the house of commons, their attendance here hath fallen into disuse.

Another privilege is, that every peer, by licence obtained from the king, may make another lord of parliament his proxy, to vote for him in his absence. A privilege, which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people.

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house; with the reasons for such dissent; which is usually styled his protest.

All bills likewise, that may in their consequences any way affect the right of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons.

QUESTIONS.

What is the nature of the power of Parliament?

Can Parliament alter the succession to the throne? or change the established religion? or re-model the whole constitution of the kingdom?

State instances of the exercise of such power.

What is the great reason there exists for sending fit persons into the House of Commons?

How old must a person be, before he can be elected a member of the House of Commons?

What oaths are necessary to be taken, before sitting in the House of Commons?

Can naturalised aliens be elected into Parliament?

On what maxim is the *lex et consuetudo Parliamenti* founded?

What did Sir John Fortescue declare to the House of Lords concerning the privileges of Parliament?

Why was privilege of Parliament principally established?

What are the advantages of keeping these privileges indefinite?

What is the extent of the freedom of speech, and of person?

Can a peer be arrested for any civil matter? or a member of the House of Commons?

What privileges have the House of Lords with respect to advice in point of law?

What is the privilege of voting by proxy? And does it extend to the House of Commons? Why?

What is the "protest" of a Peer?

Can the House of Commons interfere with any bill that affects the rights of the peerage?

THE HOUSE OF COMMONS—ITS CONSTITUTION, AND THE METHOD OF ELECTING MEMBERS.

THE peculiar laws and customs of the house of commons relate principally to the raising of taxes, and the election of members to serve in parliament.

First, with regard to taxes: it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them; although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature. The general reason given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable, if the commons taxed none but themselves: but it is notorious that a very large share of property is in the possession of the house of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore, the commons not being the sole persons taxed, this cannot be the reason of their having the sole right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this: The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the commons too lavish or improvident in their grants.

Next with regard to the election of knights, citizens, and burgesses; we may observe, that herein consists the

exercise of the democratical part of our constitution : for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies, therefore, it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death : because such a man was esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had no title. In England, where the people do not debate in a collective body, but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions, which may be reduced to these three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

1. As to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications whereby some who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

And this constitution of suffrages is framed upon a wiser principle, with us, than either of the methods of voting, by centuries, or by tribes, among the Romans. In the

method by centuries instituted by Servius Tullius; it was principally property, and not numbers, that turned the scale: in the method by tribes gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws passed by the former method had usually too great a tendency to aggrandise the patricians or rich nobles; and those by the latter had too much of a levelling principle. Our constitution steers between the two extremes. Only such are entirely excluded, as can have no will of their own: there is hardly a free agent to be found, who is not entitled to a vote in some place or other in the kingdom. Nor is comparative wealth, or property, entirely disregarded in elections; for though the richest man has only one vote at one place, yet if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. This is the spirit of our constitution; not that I assert that it is in fact quite so perfect as I have here endeavoured to describe it; for, if any alteration might be wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people*.

2. Next, as to the qualifications of persons to be elected members of the house of commons. Some of these depend upon the law and custom of parliament, declared by the house of commons; others upon certain statutes. And from these it appears, 1. That they must not be aliens born, or minors. 2. That they must not be any of the twelve judges, because they sit in the lords' house; nor of the clergy, for they sit in the convocation †; nor persons attainted of treason or felony, for they are unfit to sit any where. 3. That sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers; but the sheriffs of one

* Since the death of the Commentator, three Acts of Parliament, passed in the 2nd and 3rd year of the reign of his present Majesty, to amend the representation of the people of England and Wales, Ireland and Scotland respectively, have extended the elective franchise considerably beyond what were its limits when the above passage was written. These Acts must be consulted by persons who are now desirous of knowing the precise qualifications of electors throughout the United Kingdom.

† Now fifteen.

‡ The Clergy are expressly excluded by Statute 43 Geo. III. c. 63.

county are eligible to be knights of another. 4. That, in strictness, all members ought to have been inhabitants of the places for which they were chosen: but this, having been long disregarded, was at length entirely repealed by statute 14 Geo. III. c. 58. 5. That no persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury, nor any of the officers following, viz. commissioners of prizes, transports, sick and wounded, wine licences, navy, and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney coaches, hawkers and pedlars, nor any persons that hold any new office under the crown, created since 1705, are capable of being elected or sitting as members. 6. That no person having a pension under the crown during pleasure, or for any term of years, is capable of being elected or sitting. 7. That if any member accepts an office under the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected. 8. That all knights of the shires shall be actual knights, or such notable esquires and gentlemen as have estates sufficient to be knights, and by no means to be of the degree of yeomen. This is reduced to a still greater certainty, by ordaining, 9. That every knight of a shire shall have a clear estate of freehold or copyhold, to the value of six hundred pounds per annum, and every citizen and burgess to the value of three hundred pounds; except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities: which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men; and of this qualification the member must make oath, and give in the particulars in writing, at the time of his taking his seat. But, subject to these standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineli-

gible for that parliament by a vote of the house of commons, or for ever by an act of the legislature. But it was an unconstitutional prohibition, which was grounded on an ordinance of the house of lords, and inserted in the king's writs, for the parliament holden at Coventry, 6 Hen. IV., that no apprentice or other man of the law should be elected a knight of the shire therein; in return for which, our law books and historians have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and sir Edward Coke observes, with some spleen, that there never was a good law made thereat.

3. The third point, regarding elections, is the method of proceeding therein.

As soon as the parliament is summoned, the lord chancellor, or if a vacancy happens during the sitting of parliament, the speaker, by order of the house; and without such order, if a vacancy happens by death, or the member's becoming a peer, in the time of a recess for upward of twenty days, sends his warrant to the clerk of the crown in chancery; who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county and every city and borough therein. Within three days after the receipt of this writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members; and the said returning officers are to proceed to election within eight days from the receipt of the precept, giving four days' notice of the same; and to return the persons chosen, together with the precept, to the sheriff.

But elections of knights of the shire must be proceeded to by the sheriffs themselves in person, at the county court. The county court is a court held every month or oftener by the sheriff, intended to try little causes not exceeding the value of forty shillings, in what part of the county he pleases to appoint for that purpose: but for the election of knights of the shire it must be held at the most usual place*.

* Where counties are divided into parts, and members returned for each part, which happens in many cases under statute 2 W. IV. c. 45, the county court is held in the principal town in each division. But though the election takes place, and the county court is held, in the principal place only, several places throughout the county are appointed for taking the poll.

And, as it is essential to the very being of parliament that elections should be absolutely free, therefore all undue influences upon the electors are illegal and strongly prohibited. As soon therefore as the time and place of election, either in counties or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more; and not to return till one day after the poll is ended. Riots likewise have been frequently determined to make an election void. By vote also of the house of commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and, by statute, the lord warden of the cinque ports shall not recommend any members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter, or dissuading him, he forfeits 100*l.* and is disabled to hold any office.

Thus are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption. To prevent which it is enacted, that no candidate shall, after the date, usually called the *teste*, of the writs, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected: on pain of being incapable to serve for that place in parliament. And if any money, gift, office, employment, or reward be given or promised to be given to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers such bribe, forfeits 500*l.*, and is for ever disabled from voting and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind; and then he is indemnified for his own offence. The first instance that occurs of election bribery, was so early as 13 Eliz. when one Thomas Longe, being a simple man and of small capacity to serve in parliament, acknowledged that he had given the returning officer and others of the borough for which he was chosen, four pounds to be returned member,

and was for that premium elected. But for this offence the borough was amerced, the member was removed, and the officer fined and imprisoned. But, as this practice hath since taken much deeper, and more universal root, it hath occasioned the making of these wholesome statutes: to complete the efficacy of which there is nothing wanting but resolution and integrity to put them in strict execution.

The election being closed, the returning officer in boroughs returns his precept to the sheriff, with the persons elected by the majority; and the sheriff returns the whole, together with the writ for the county and the knights elected thereupon, to the clerk of the crown in chancery. The members returned by him are the sitting members, until the house of commons, upon petition, shall adjudge the return to be false and illegal. The form and manner of proceeding upon such petition are now regulated by statute 10 Geo. III. c. 16. amended by several subsequent statutes, which directs the method of choosing by lot a select committee of members, who are sworn well and truly to try the same, and a true judgment to give according to the evidence. And this abstract of the proceedings at elections of knights, citizens, and burgesses, concludes our inquiries into the laws and customs more peculiarly relative to the house of commons.

QUESTIONS.

What is the right of the house of commons with reference to taxes? And on what constitutional principle is it founded?

Why ought not the house of lords to have any power of framing new taxes?

Why is a *qualification* necessary for a member of the house of commons?

In what particulars is our constitution, in this respect, superior to the ancient Roman?

Can any of the judges sit in the house of commons? Why?

Can any of the clergy? Can sheriffs, mayors, or bailiffs?

Can a pensioner, during pleasure, or for a term of years?

What is the consequence of a member of the house of commons

accept office under the crown? Does this extend to a naval or military person accepting a new commission?

What qualification in point of estate is required in members for counties and boroughs?

What is the practical procedure in electing members of the house of commons?

Can the military remain in any place during an election?

Can peers, or officers of the stamps, excise, customs, &c. interfere in elections?

What is the punishment of bribery?

How is it tried whether a member has been rightly or wrongfully elected?

ROUTINE OF BUSINESS IN THE HOUSES OF PARLIAMENT.
WITH THEIR ADJOURNMENT, PROROGATION, AND
DISSOLUTION.

THE method of making laws is much the same in both houses: and I shall touch it very briefly, beginning in the house of commons. But first I must premise, that for despatch of business each house of parliament has its speaker. The speaker of the house of lords, whose office is to preside there, and manage the formality of the business, is the lord chancellor, or keeper of the king's great seal, or any other appointed by the king's commission: and, if none be so appointed, the house of lords, it is said, may elect. The speaker of the house of commons is chosen by the house; but must be approved by the King. And herein the usage of the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house; but the speaker of the house of lords, if a lord of parliament, may. In each house the act of the majority binds the whole; and this majority is declared by votes openly and publicly given; not as at Venice and many other senatorial assemblies, privately or by ballot. This latter method may be serviceable to prevent intrigues and unconstitutional combinations; but it is impossible to be practised with us, at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection.

To bring a bill into the house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition, when founded on facts that may be in their nature disputed, is referred to a committee of members, who examine the matter alleged, and accordingly report to the house; and then, or otherwise upon the mere petition,

leave is given to bring in a bill. In public matters the bill is brought in upon motion made to the house without any petition at all. Formerly, all bills were drawn in the form of petitions, which were entered upon the parliament rolls, with the king's answer thereunto subjoined; not in any settled form of words, but as the circumstances of the case might require: and at the end of each parliament the judges drew them into the form of a statute, which was entered on the statute rolls. In the reign of Henry V., to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and in the reign of Henry VI., bills in the form of acts, according to the modern custom were first introduced.

The persons directed to bring in the bill, present it in a competent time to the house, drawn out on paper, with a multitude of blanks, or void spaces, where any thing occurs that is dubious, or necessary to be settled by the parliament itself; such especially as the precise date of times, the nature and quantity of penalties or of any sums of money to be raised, being indeed only the skeleton of the bill. In the house of lords, when the bill begins there, it is, when of a private nature, referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading the speaker opens to the house the substance of the bill, and puts the question, whether it shall proceed any further? The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be dropped for that session: as it must also if opposed with success in any of the subsequent stages.

After the second reading it is committed, that is, referred to a committee; which is either selected by the house in matters of small importance, or else, upon a bill of consequence, the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair, another member being appointed chairman, and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely

new modelled. After it has gone through the committee, the chairman reports it to the house with such amendments as the committee have made; and then the house re-considers the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong goss hand, on one or more long rolls or presses of parchment sewed together. When this is finished, it is read a third time, and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a rider. The speaker then again opens the contents; and, holding it up in his hands, puts the question, whether the bill shall pass? If this is agreed to, the title to it is then settled; which used to be a general one for all the acts passed in the session, till, in the first year of Henry VIII. distinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the Bar of the house of peers, and there delivers it to their speaker, who comes down from his woosack to receive it.

It there passes through the same forms as in the other house, except engrossing, which is already done, and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message by two masters in chancery, or upon matters of high dignity or importance, by two of the judges, that they have agreed to the same: and the bill remains with the lords, if they have made no amendment to it. But, if any amendments are made, such amendments are sent down with the bill, to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; who for the most part settle and adjust the difference: but, if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But, when an act of

grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment. And when both houses have done with any bill, it always is deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which after receiving the concurrence of the lords is sent back to the house of commons.

The royal assent may be given two ways: 1. In person; when the king comes to the house of peers, in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman-French; a badge, it must be owned, now the only one remaining, of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the king consents to a public bill, the clerk usually declares, "*le roy le veut*, the king wills it so to be;" if to a private bill, "*soit fait comme il est désiré*, be it as it is desired." If the king refuses his assent, it is in the gentle language of "*le roy s'avisera*, the king will advise upon it." When a bill of supply is passed, it is carried up and presented to the king by the speaker of the house of commons; and the royal assent is thus expressed, "*le roy remercie ses loyal subjects, accepte leur benevolence, et aussi le veut*, the king thanks his loyal subjects, accepts their benevolence, and wills it so to be." In case of an act of grace, which, originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject; "*les prelates, seigneurs, et commons, en ce present parlement assemblés, au nom de tous vous autres subjects, remercient tres humblement votre majesté, et prient a Dieu vous donner en sante bone vie et longue*; the prelates, lords, and commons, in this present parliament assembled, in the name of all your other subjects, most humbly thank your majesty, and pray to God to grant you in health and wealth long to live." 2. By the statute 33 Henry VIII. c. 21, the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high house. And, when the bill has received the royal assent

in either of these ways, it is then, and not before, a statute or act of parliament.

This statute or act is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the emperor's edicts; because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the king's press for the information of the whole land. And formerly, before the invention of printing, it was used to be published by the sheriff of every county; the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session, commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publicè proclamari et firmiter teneri et observari faciat.*" And the usage was to proclaim them at his county court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry the seventh.

An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation. It is true it was formerly held, that the king might in many cases dispense with penal statutes; but now, by statute 1 W. & M. et. 2, c. 2, it is declared, that the suspending, or dispensing with laws by regal authority, without consent of parliament, is illegal.

There remains only to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or dissolved.

An *adjournment* is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately or jointly, and sometimes for a fortnight or month at Christmas or Easter, or upon other particu-

lar adjournments. But the adjournment of one house is no adjournment of the other. It hath also been usual, when his majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure so signified, and to adjourn accordingly. Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow, which would often be very inconvenient to both public and private business. For prorogation puts an end to the session; and then such bills as are only begun and not perfected, must be resumed *de novo*, if at all, in a subsequent session: whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A *prorogation* is the continuance of the parliament from one session to another, as an adjournment is the continuation of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in his majesty's presence, or by commission from the crown, or, frequently, by proclamation. Both houses are necessarily prorogued at the same time; it not being a prorogation of the house of lords or commons, but of the parliament. And while the parliament is separated by adjournment or prorogation, the king is empowered to call them together by proclamation, with fourteen days' notice of the time appointed for their re-assembling*.

A *dissolution* is the civil death of the parliament; and this may be effected three ways: 1. By the king's will, expressed either in person or by representation. For, as the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may, whenever he pleases, prorogue the parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power; as was fatally experienced by the unfortunate king Charles the first; who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate

* 37 Geo. III., c. 127; and 40 Geo. III., c. 14.

power, which he himself had consented to give them. It is therefore extremely necessary that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand, they may frequently and regularly come together for the despatch of business, and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.

2. A parliament may be dissolved by the demise of the crown. This dissolution formerly happened immediately upon the death of the reigning sovereign: for he being considered in law as the head of the parliament, *caput, principium, et finis*, that failing, the whole body was held to be extinct. But, the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 & 8 W. III. c. 15, and 6 Ann, c. 7, that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor; that, if the parliament be, at the time of the king's death, separated by adjournment or prorogation, it shall, notwithstanding, assemble immediately: and that, if no parliament is then in being, the members of the last parliament shall assemble and be again a parliament.

3. Lastly, a parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual; or might last for the life of the prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy; but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again, whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others, will think themselves bound in interest, as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit, by the statute 6 W. & M. c. 2,

was three years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. I. st. 2, c. 38, in order, professedly, to prevent the great and continued expences of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion, this term was prolonged to seven years: and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every SEVENTH year; if not sooner dissolved by the royal prerogative.

QUESTIONS.

Who is the Speaker of the House of Lords?

How is the Speaker of the House of Commons elected?

What is the distinction between the functions of the two Speakers, with reference to taking part in the Debates?

Does the majority bind the whole? And how is the majority declared?

What is the method of bringing a Private Bill into the House of Commons? A Public Bill?

How is a Private Bill introduced into the House of Lords?

What is done at the first reading? At the second reading?

What is a "Committee of the Whole House," and how is it formed?

What is done with a bill in these Committees?

What steps are taken when the bill has gone through the Committee?

What is a "Rider," and how is it managed?

When is the Title of a bill settled?

How does it go to the House of Lords?

How is it rejected?

How does the House of Lords signify its consent to a bill?

How does the House of Lords make Amendments?

What is the consequence of the House of Commons agreeing or disagreeing to Amendments?

What becomes of a bill when it has passed both Houses of Parliament?

What is done with a *Bill of Supply* ?

How may the Royal assent be given to a bill ?

How is the Royal assent expressed, in case of a public bill ? Of a private bill ?

In what language does the King *refuse* his assent ?

How is the Royal assent to a Bill of Supply expressed ?

What is an Act of Grace, and what are the proceedings upon it ?

Can the King give his assent to a bill in his absence ?

How ? And by what authority ?

When does a bill become a STATUTE, or Act of Parliament ?

Where is this Statute or Act placed ?

How is it published to the country, and promulgated ?

How must a Statute, or Act of Parliament, be altered, suspended, or repealed ?

What is an *Adjournment* of Parliament ? And how is it effected ?

What is a *Prorogation* ? And how effected ?

How is the Parliament when adjourned or prorogued called together again ?

What is a *Dissolution* ?

In how many ways may Parliament be dissolved ?

On what principles may the King dissolve it at his pleasure ?

What memorable instance is there, of the danger of permitting its continuance independent of the King's will ?

What is the effect of the demise of the Crown upon the continuance of Parliament ?

What is to be done if no Parliament be in being at such a time ?

How long does a Parliament last, if not dissolved by the King, or by the demise of the Crown ?

THE DOCTRINE OF THE HEREDITARY RIGHT TO THE BRITISH THRONE.

THE supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen: for it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power.

The executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision, who is that single person, to whom are committed, in subserviency to the law of the land, the care and protection of the community; and, to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquillity, and to the consciences of private men, that this rule should be clear and indisputable; and our constitution has not left us in the dark upon this material occasion.

The grand fundamental maxim upon which the right of succession to these kingdoms, depends, I take to be this: "that the crown is, by common law and constitutional custom, hereditary; and this in a manner peculiar to itself: but that the right of inheritance may from time to time be changed or limited by act of parliament, under which limitations the crown still continues hereditary."

1. First, it is in general *hereditary* or *descendible to the next heir*, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective: and, as I believe there is no instance where the crown of England has ever been asserted to be elective, except by

the regicides at the infamous and unparalleled trial of ~~king~~ Charles I., it must of consequence be hereditary.

It must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, hath usually been elective. And, if the individuals who compose that state, could always continue true to its first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a kingdom, as in other inferior communities. The best, the wisest, and the bravest man would then be sure of receiving that crown which his endowments have merited; and the sense of an unbiassed majority would be dutifully acquiesced in by the few who were of different opinions. But history and observation will inform us, that elections of every kind, in the present state of human nature, are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority. This is an evil to which all societies are liable; as well those of a private and domestic kind, as the great community of the public which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has, by becoming such, virtually engaged to submit. Whereas, in the great and independent society which every nation composes, there is no superior to resort to but the law of nature; no method to redress the infringements of that law but the actual exertion of private force. As therefore between two nations complaining of mutual injuries, the quarrel can only be decided by the law of arms; so, in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battles, the

only process by which the appeal can be carried on is that of a civil and intestine war. An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of ancient imperial Rome, and the more modern experience of Poland and Germany, may show us, are the consequences of elective kingdoms.

2. But, secondly, as to the *particular mode of inheritance*, it in general corresponds with the feudal path of descents, chalked out by the common law in the succession to landed estates; yet with one or two material exceptions. Like estates, the crown will descend lineally to the issue of the reigning monarch; as it did from king John to Richard II., through a regular pedigree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward V. succeeded to the crown in preference to Richard his younger brother and Elizabeth his elder sister. Like lands or tenements, the crown, on failure of the male line, descends to the issue female; thus, Mary I. succeeded to Edward VI.; and the line of Margaret queen of Scots, the daughter of Henry VII., succeeded on failure of the line of Henry VIII., his son. But, among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect; and therefore queen Mary on the death of her brother, succeeded to the crown alone, and not in partnership with her sister Elizabeth. Again: the doctrine of representation prevails in the descent of the crown, as it does in other inheritances, whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Thus, Richard II. succeeded his grandfather Edward III., in right of his father the Black Prince; to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late king: provided they are lineally descended from the blood royal, that is, from that royal stock which originally acquired the crown. Thus, Henry I. suc-

ceeded to William II., John to Richard I., and James I. to Elizabeth; being all derived from the Conqueror, who was then the only regal stock. But herein there is no objection to the succession of a brother, an uncle, or other collateral relation, of the half blood; that is, where the relationship proceeds not from the same couple of ancestors, (which constitutes a kinsman of the whole blood,) but from a single ancestor only; as when two persons are derived from the same father, and not from the same mother, or *vice versa*: provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood-royal is communicated to each. Thus, Mary I. inherited to Edward VI. and Elizabeth inherited to Mary; all children of the same father, king Henry VIII. but all by different mothers.

3. *The doctrine of hereditary right does by no means imply an indefeasible right to the throne.* No man will, I think, assert this, that has considered our laws, constitution, and history, without prejudice, and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the king and both houses of parliament, to defeat this hereditary right, and, by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution; as may be gathered from the expression so frequently used in our statute book, of "the king's majesty, his heirs, and successors." In which we may observe, that, as the word "heirs," necessarily implies an inheritance or hereditary right, generally subsisting in the royal person; so, the word "successors," distinctly taken, must imply that this inheritance may sometimes be broken through; or that there may be a successor, without being the heir of the king. And this is so extremely reasonable, that without such a power lodged somewhere, our polity would be very defective. For, let us barely suppose so melancholy a case as that the heir apparent should be a lunatic, an idiot, or otherwise incapable of reigning; how miserable would the condition of the nation be, if he were also incapable of being set aside!—It is therefore necessary that this power should be lodged somewhere; and yet, the inheritance and regal dignity would be very precarious indeed, if this power were expressly and avowedly lodged in the hands of the

subject only, to be exerted whenever prejudice, caprice, or discontent should happen to take the lead. Consequently, it can no where be so properly lodged as in the two houses of parliament, by and with the consent of the reigning king; who, it is not to be supposed, will agree to any thing improperly prejudicial to the rights of his own descendants. And therefore, in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. But, fourthly; *however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it.* • And hence, in our law, the king is said never to die, in his *political* capacity; though, in common with other men, he is subject to mortality in his *natural*; because immediately upon the natural death of Henry, William, or Edward, the king survives in his successor. For the right of the crown vests, *eo instanti*, in his heir; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum*; but, as sir Matthew Hale observes, the right of sovereignty is fully invested in the successor by the very descent of the crown. And therefore, however acquired, it becomes in him absolutely hereditary, unless by the rules of the limitation it is otherwise ordered and determined. In the same manner as landed estates, to continue our former comparison, are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heir at law; but if the transfer be clogged with any limitations, conditions, or entails the lands must descend in that channel, so limited and prescribed, and no other.

In these four points consist, as I take it, the constitutional notion of hereditary right to the throne: which will be still farther elucidated, and made clear beyond all dispute, from a short historical view of the successions to the crown of England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar, the hereditary title to the throne. And in the pursuit of this inquiry we shall find, that, from the days of Egbert,

the first sole monarch of this kingdom, even to the present, the four cardinal maxims above-mentioned have ever been held the constitutional canons of succession. It is true, the succession, through fraud or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And, even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it; of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And, when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted, or endeavoured to transmit it, to their own posterity, by a kind of hereditary right of usurpation.

QUESTIONS.

Where is the *executive power* of Great Britain lodged?

What is the great fundamental maxim on which the Right of Succession to the British Throne depends?

What are the two kinds of regal Government?

Is the British Crown elective or hereditary?

What are the theoretical advantages, and the practical disadvantages of an elective Monarchy?

State instances of the evil consequences of elective kingdoms.

By what principles is the descent of the Crown regulated?

According to what principle did the Crown descend from John to Richard II.?

Why did Edward V. succeed to the throne in preference to his younger brother Richard, and his elder sister Elizabeth?

How did Mary I. succeed to Edward VI.?

On what principle did Mary succeed to the Crown alone, and not in partnership with her sister Elizabeth?

In what right did Richard II. succeed to Edward III.?

How did Henry I. succeed to William Rufus? and James I. to Elizabeth?

Why did Mary I. succeed to Edward VI. and Elizabeth to Mary?

Because the right to the Throne is hereditary, is it therefore *indefeasible* ? ”

What is implied in the words “ The King’s Majesty, his Heirs and Successors ? ”

How may the right to the Throne be defeated ?

What is the signification of the phrase “ *the King never dies* ? ”

State the four points in which consists the constitutional doctrine of this hereditary right to the Throne ?

Have these principles been invariably regarded in the course of English History ?

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HISTORY OF THE SUCCESSION OF THE BRITISH MONARCHS.

KING Egbert, about the year 800, found himself in possession of the throne of the West Saxons, by a long and undisturbed descent from his ancestors of above three hundred years. How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of such high antiquity, as must render all inquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better. The other kingdoms of the heptarchy he acquired, some by conquest, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that *when one country is united to another in such a manner, as that one keeps its government and states and the other loses them, the latter entirely assimilates with or is melted down in the former, and must adopt its laws and customs.* And, in pursuance of this maxim, there hath ever been, since the union of the heptarchy in king Egbert, a general acquiescence under the hereditary monarch of the West Saxons, through all the united kingdoms.

From Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly, through a succession of fifteen princes, without any deviation or interruption: save only that the sons of king Ethelwolf succeeded to each other in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the wittenagemote, in the heat of the Danish invasions; and also that king Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew, a minor, the times being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute king of Denmark; and Canute, after his death, seized the whole of it, Edmund's sons being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom however this new acquired throne continued hereditary, for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was restored in the person of Edward the Confessor.

He was not indeed the true heir to the crown, being the younger brother of king Edmund Ironside, who had a son Edward, surnamed (from his exile) the Outlaw, still living. But this son was then in Hungary: and, the English having just then shaken off the Danish yoke, it was necessary that somebody on the spot should mount the throne; and the Confessor was the next of the royal line then in England. On his decease without issue, Harold II. usurped the throne; and almost at the same instant came on the Norman invasion: the right to the crown being all the time in Edgar, surnamed Atheling, which signifies in the Saxon language *illustrious* or of *royal blood*, who was the son of Edward the Outlaw, and grandson of Edmund Ironside; or, as Matthew Paris well expresses the sense of our old constitution, "*Edmundus autem latusferreum, rex naturalis de stirpe regum, genuit Edwardum: et Edwardus genuit Edgurum, cui de jure debebatur regnum Anglorum.*"

• William the Norman claimed the crown by virtue of a pretended grant from king Edward the Confessor: a grant which, if real, was in itself utterly invalid; because it was made, as Harold well observed in his reply to William's demand, "*absque generali senatus et populi conventu et edicto*;" which also very plainly implies, that it then was generally understood, that the king, with consent of the general council, might dispose of the crown, and change the line of succession. William's title, however, was altogether as good as Harold's, he being a mere private subject, and an utter stranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times; though frequently asserted by the English nobility after the conquest, till such time as he died without issue: but all their attempts proved unsuccessful, and only

served the more firmly to establish the crown in the family which had newly acquired it.

The conquest then by William of Normandy was, like that of Canute before, a forcible transfer of the crown of England into a new family; but, the crown being so transferred, all the inherent properties of the crown were with it transferred also. For, the victory obtained at Hastings, not being a victory over the nation collectively, but only over the person of Harold, the only right that the Conqueror could pretend to acquire thereby, was *the right to possess the crown of England, not to alter the nature of the government.* And therefore, as the English laws still remained in force, he must necessarily take the crown subject to those laws, and with all its inherent properties, the first and principal of which was its descendibility. Here then we must drop our race of Saxon kings, at least for a while, and derive our descents from William the Conqueror, as from a new stock, who acquired by right of war (such as it is, yet still the dernier ressort of kings) a strong and undisputed title to the inheritable crown of England.

Accordingly it descended from him to his sons William II. and Henry I. Robert, it must be owned, his eldest son, was kept out of possession by the arts and violence of his brethren; who perhaps might proceed upon a notion, which prevailed for some time in the law of descents, though never adopted as the rule of public succession, that when the eldest son was already provided for, as Robert was constituted duke of Normandy by his father's will, in such a case the next brother was entitled to enjoy the rest of their father's inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have had at first.

Stephen of Blois, who succeeded him, was indeed the grandson of the conqueror by Adelia his daughter, and claimed the throne by a feeble kind of hereditary right; not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald, who was earl of Blois, and therefore seems to have waved, as he certainly never insisted on, so troublesome and precarious a claim. The real right was in the empress Matilda or Maud the daughter of Henry I.; the rule of succession being, where women are admitted at all, that the daughter of a son shall be preferred to the son of a

daughter. So that Stephen was little better than a mere usurper; and therefore he rather chose to rely on a title by election, while the empress Maud did not fail to assert her hereditary right by the sword; which dispute was attended with various success, and ended at last in the compromise made at Wallingford, that Stephen should keep the crown, but that Henry the son of Maud should succeed him; as he afterwards accordingly did.

Henry, the second of that name, was, next after his mother Matilda, the undoubted heir of William the conqueror; but he had also another connection in blood, which endeared him still farther to the English. He was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward the outlaw, the son of Edmund Ironside, had, besides Edgar Atheling, who died without issue, a daughter Margaret, who was married to Malcolm king of Scotland; and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda the wife of Henry I. who by him had the empress Maud the mother of Henry II. Upon which account, the Saxon line is in our histories frequently said to have been restored in his person: though in reality that right subsisted in the sons of Malcolm by queen Margaret; king Henry's best title being as heir to the conqueror.

From Henry II. the crown descended to his eldest son Richard I., who dying childless, the right vested in his nephew Arthur the son of Geoffrey his next brother; but John, the youngest son of king Henry, seized the throne; claiming, as appears from his charters, the crown by hereditary right: that is to say, that he was next of kin to the deceased king, being his surviving brother: whereas Arthur was removed one degree farther, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents hath been now settled for so many centuries, they were sufficient to puzzle the understandings of our brave, but unlettered ancestors. Nor indeed can we wonder at the number of partizans who espoused the pretensions of king John in particular; since, even in the reign of his father king Henry II. it was a point undetermined, whether, even in

common inheritances, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood. Nor is it to this day decided in the collateral succession to the fiefs of the empire, whether the order of the stocks, or the proximity of the degree, shall take place. However, on the death of Arthur and his sister Eleanor without issue, a clear and indisputable title vested in Henry III. the son of John : and from him to Richard the second, a succession of six generations, the crown descended in the true hereditary line. Under one of which race of princes we find it declared in parliament, "that the law of the crown of England is, and always hath been, that the children of the king of England, whether born in England or elsewhere, ought to bear the inheritance after the death of their ancestors. Which law our sovereign lord the king, the prelates, earls, and barons, and other great men, together with all the commons in parliament assembled, do approve and affirm for ever."

Upon Richard the second's resignation of the crown, he having no children, the right resulted to the issue of his grandfather Edward III. That king had many children besides his eldest Edward the Black Prince of Wales, the father of Richard II. ; but to avoid confusion I shall only mention three ; William his second son, who died without issue ; Lionel, duke of Clarence, his third son ; and John of Gant, duke of Lancaster, his fourth. By the rules of succession therefore the posterity of Lionel duke of Clarence were entitled to the throne upon the resignation of king Richard ; and had accordingly been declared by the king, many years before, the presumptive heirs of the crown : which declaration was also confirmed in parliament. But Henry duke of Lancaster, the son of John of Gant, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety ; and he became king under the title of Henry IV. But, as Sir Matthew Hale remarks, though the people unjustly assisted Henry IV. in his usurpation of the crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror, which he very much inclined to do, but successor, descended by right line of the blood royal : as

appears from the rolls of parliament in those times. And in order to this, he set up a shew of two titles: the one upon the pretence of being the first of the blood royal in the entire male line; whereas the duke of Clarence left only one daughter Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the house of York descended: the other, by reviving an exploded rumour, first propagated by John of Gant, that Edmond earl of Lancaster, to whom Henry's mother was heiress, was in reality the elder brother of king Edward I., though his parents, on account of his personal deformity, had imposed him on the world for the younger; and therefore Henry would be entitled to the crown, either as successor to Richard II., in case the entire male line was allowed a preference to the female, or even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

However, as in Edward the third's time we find the parliament approving and affirming the law of the crown, as before stated, so in the reign of Henry IV. they actually exerted their right of new-settling the succession to the crown. And this was done by the statute 7 Hen. IV. c. 2, whereby it is enacted, "that the inheritance of the crown and realms of England and France, and all other the king's dominions, shall be set and remain in the person of our sovereign lord the king, and in the heirs of his body issuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to lord Thomas, lord John, and lord Humphrey, the king's sons, and the heirs of their bodies respectively: which is indeed nothing more than the law would have done before, provided Henry the Fourth had been a rightful king. It however serves to shew that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown: and we may also observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However sir Edward Coke more than once expressly declares, that, at the time of passing this act, the right of the crown was in the descent from Philippa, daughter and heir of Lionel duke of Clarence.

Nevertheless the crown descended regularly from Henry IV. to his son and grandson Henry V. and VI.; in the

latter of whose reigns the house of York asserted their dormant title; and, after embroiling the kingdom in blood and confusion for seven years together, at last established it in the person of Edward IV. At his accession to the throne, after a breach of the succession, that continued for three descents and above threescore years, the distinction of a king *de jure* and a king *de facto* began to be first taken, in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom by confirming all honours conferred, and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edward IV. c. 1. the three Henries are styled, "late kings of England in dede, and not of ryght." And, in all the charters which I have met with of king Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ.*"

Edward IV. left two sons and a daughter; the eldest of which sons, king Edward V., enjoyed the regal dignity for a very short time, and was then deposed by Richard his unnatural uncle, who immediately usurped the royal dignity; having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV., to make a shew of some hereditary title: after which he is generally believed to have murdered his two nephews, upon whose death the right of the crown devolved to their sister Elizabeth.

The tyrannical reign of king Richard III. gave occasion to Henry earl of Richmond to assert his title to the crown, a title the most remote and unaccountable that ever was set up, and which nothing could have given success to, but the universal detestation of the then usurper Richard. For, besides that he claimed under a descent from John of Gant, whose title was now exploded; the claim, such as it was, was through John earl of Somerset, a bastard son, begotten by John of Gant upon Catherine Swinford. It is true, that, by an act of parliament 20 Rich. II., this son was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock; but still with an express reservation of the crown, "*excepta dignitate regali.*"

Notwithstanding all this, immediately after the battle of Bosworth-field, he assumed the regal dignity; the right of the crown then being, as sir Edward Coke expressly declares,

in Elizabeth, eldest daughter of Edward IV. : and his possession was established by parliament, holden the first year of his reign. In the act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV. ; and therefore, as lord Bacon, the historian of this reign, observes, carefully avoided any recognition of Henry VII.'s right, which indeed was none at all ; and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him ; and therefore a middle way was rather chosen, by way, as the noble historian expresses it, of establishment, and that under covert and indifferent words, " that the inheritance of the crown should rest, remain, and abide in king Henry VII. and the heirs of his body ; " thereby providing for the future, and at the same time acknowledging his present possession ; but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon after married Elizabeth of York, the undoubted heiress of the conqueror, and thereby gained, as sir Edward Coke declares, by much his best title to the crown. Whereupon the act made in his favour was so much disregarded, that it never was printed in our statute books.

Henry the Eighth, the issue of this marriage, succeeded to the crown by clear indisputable hereditary right, and transmitted it to his three children in successive order. But in his reign we at several times find the parliament busy in regulating the succession to the kingdom. And, first, by statute 25 Henry VIII. c. 12, which recites the mischiefs which have and may ensue by disputed titles, because no perfect and substantial provision hath been made by law concerning the succession ; and then enacts, that the crown shall be entailed to his majesty, and the sons or heirs male of his body ; and in default of such sons to the lady Elizabeth, who is declared to be the king's eldest issue female, in exclusion of the lady Mary, on account of her supposed illegitimacy by the divorce of her mother queen Catherine, and to the lady Elizabeth's heirs of her body ; and so on from issue female to issue female, and the heirs of their bodies, by course of inheritance according to their ages, as the crown of England hath been accustomed and ought to go, in case where there be heirs female of the same ; and in default of issue female,

then to the king's right heirs for ever. *This single statute, is an ample proof of all the four positions we at first set out with.*

But, upon the king's divorce from Ann Boleyn, this statute was, with regard to the settlement of the crown, repealed by statute 28 Hen. VIII. c. 7, wherein the lady Elizabeth is also, as well as the lady Mary, bastardized, and the crown settled on the king's children by queen Jane Seymour, and his future wife, and, in defect of such children, then with this remarkable remainder, to such persons as the king by letters patent, or last will and testament, should limit and appoint the same. A vast power; but notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. VIII. c. 1. the king's two daughters are legitimated again, and the crown is limited to prince Edward by name, after that to the lady Mary, and then to the lady Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the crown.

But lest there should remain any doubt in the minds of the people, through this jumble of acts for limiting the succession; by statute 1 Mar. stat. 2. c. 1, queen Mary's hereditary right to the throne is acknowledged and recognised in these words: "the crown of these realms is most lawfully, justly, and rightly descended and come to the queen's highness that now is, being the very, true, and undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the statute which settles the preliminaries of that match, the hereditary right to the crown is thus asserted and declared: "as touching the right of the queen's inheritance in the realm and dominions of England, the children, whether male or female, shall succeed in them, according to the known laws, statutes, and customs of the same." Which determination of the parliament, that the succession shall continue in the usual course, seems tacitly to imply a power of new modelling and altering it, in case the legislature had thought proper.

On queen Elizabeth's accession, her right is recognised in still stronger terms than her sister's; the parliament

acknowledging "that the queen's highness is, and in very deed and of most mere right ought to be, by the laws of God, and the laws and statutes of this realm, our most lawful and rightful sovereign, liege lady and queen; and that her highness is rightly, lineally, and lawfully descended and come of the blood royal of this realm of England; in and to whose princely person, and to the heirs of her body lawfully to be begotten, after her, the imperial crown and dignity of this realm doth belong." And in the same reign, by statute 13 Eliz. c. 1, we find the right of parliament to direct the succession of the crown asserted in the most explicit words. "If any person shall hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; or that the queen's majesty, with and by the authority of parliament, is not able to make laws and statutes of sufficient force and validity, to limit and bind the crown of this realm, and the descent, limitation, inheritance, and government thereof; such person, so holding, affirming, or maintaining, shall, during the life of the queen, be guilty of high treason; and after her decease shall be guilty of a misdemeanor, and forfeit his goods and chattels."

On the death of queen Elizabeth, without issue, the line of Henry VIII. became extinct. It therefore became necessary to recur to the other issue of Henry VII. by Elizabeth of York his queen; whose eldest daughter Margaret having married James IV. king of Scotland, king James the sixth of Scotland, and of England the first, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry VIII., centred all the claims of different competitors, from the conquest downwards, he being indisputably the lineal heir of the conqueror. And, what is still more remarkable, in his person also centred the right of the Saxon monarchs, which had been suspended from the conquest till his accession. For, as was formerly observed, Margaret, the sister of Edgar Atheling, the daughter of Edward the outlaw, and grand-daughter of king Edmond Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the conquest, resided. She married Malcolm king of Scotland; and Henry II., by a descent from Matilda their daughter, is generally called the restorer of the Saxon line. But it must be remembered, that Malcolm, by his Saxon

queen, had sons as well as daughters; and that the royal family of Scotland, from that time downwards, were the offspring of Malcolm and Margaret. Of this royal family, king James the First was the direct lineal heir, and therefore united in his person every possible claim, by hereditary right, to the English as well as Scottish throne, being the heir both of Egbert and William the Conqueror.

And it is no wonder that a prince of more learning than wisdom, who could deduce an hereditary title for more than eight hundred years, should easily be taught by the flatterers of the times, to believe there was something divine in this right, and that the finger of Providence was visible in its preservation. Whereas, though a wise institution, it was clearly a human institution: and the right inherent in him no natural, but a positive right. And in this and no other light was it taken by the English parliament; who by statute 1 Jac. I. c. 1. did "recognize and acknowledge, that immediately upon the dissolution and decease of Elizabeth, late queen of England, the imperial crown thereof did by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent majesty, as being lineally, justly, and lawfully, next and sole heir of the blood royal of this realm." Not a word here of any right immediately derived from heaven: which, if it existed any where, must be sought for among the aborigines of the island, the ancient Britons; among whose princes indeed some have gone to search it for him*.

But wild and absurd as the doctrine of divine right most undoubtedly is, it is still more astonishing, that when so many human hereditary rights had centered in this king, his son and heir, king Charles the first, should be told by those infamous judges who pronounced his unparalleled sentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness, which followed the fatal catastrophe of that pious and unfortunate prince, will be a standing argument in favour of hereditary monarchy to all future ages; as they proved at last to the then deluded people; who in

* Elizabeth of York, mother of Margaret of Scotland, was heiress of the House of Mortimer, which, by its descent from Gladys, sister of Llewellyn ap Iorwerth the Great, had the true right to the principality of Wales.

order to recover that peace and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the estates, restored the right heir of the crown. And in the proclamation for that purpose, which was drawn up and attended by both houses, they declared, "that, according to their duty and allegiance, they did heartily, joyfully, and unanimously, acknowledge and proclaim, that immediately upon the decease of our late sovereign lord king Charles, the imperial crown of these realms did by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent majesty, Charles the second, as being lineally, justly, and lawfully, next heir of the blood royal of this realm; and thereunto they most humbly and faithfully did submit and oblige themselves, their heirs, and posterity for ever."

Thus I think it clearly appears, from the highest authority this nation is acquainted with, that the crown of England hath ever been an hereditary crown; though subject to limitations by parliament. The remainder of this chapter will consist principally of those instances, wherein the parliament has asserted or exercised this right of altering and limiting the succession; a right which, we have seen, was before exercised and asserted in the reigns of Henry IV., Henry VII., Henry VIII., queen Mary, and queen Elizabeth.

The first instance, in point of time, is the famous BILL OF EXCLUSION which raised such a ferment in the latter end of the reign of king Charles the second. It is well known that the purport of this bill was to have set aside the king's brother and presumptive heir, the duke of York, from the succession, on the score of his being a papist: that it passed the house of commons, but was rejected by the lords; the king having also declared before hand, that he never would be brought to consent to it. And from this transaction we may collect two things: 1. That the crown was universally acknowledged to be hereditary: and the inheritance indefeasible unless by parliament: else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the inheritance: else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the *power*, but merely the *propriety*, of an exclusion. However, as the bill took no effect, king

James the second succeeded to the throne of his ancestors ; and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which, with other concurring circumstances, brought on the revolution in 1688.

The true ground and principle upon which that memorable event proceeded, was an entirely new case in politics, which had never before happened in our history ; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeazance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament ; it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses came to this resolution : " that king James the second having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people ; and, by the advice of jesuits and other wicked persons, having violated the fundamental laws ; and having withdrawn himself out of this kingdom ; has abdicated the government, and that the throne is thereby vacant." Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession ; which, from the conquest, had lasted above six hundred years, and, from the union of the heptarchy in king Egbert, almost nine hundred. The facts themselves thus appealed to, the king's endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious ; and the consequences drawn from the facts, namely, that they amounted to an abdication of the government ; which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant, it belonged to our ancestors to determine. For whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself ; there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the

whole society. The reasons upon which they decided may be found at large in the parliamentary proceedings of the times; and may be matter of instructive amusement for us to contemplate, as a speculative point of history. But care must be taken not to carry this inquiry farther, than merely for instruction or amusement. The idea, that the consciences of posterity were concerned in the rectitude of their ancestors' decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are all happily extinguished. I therefore rather chuse to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience; because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient. Whereas, our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty at this distance of time to acquiesce in their determination; being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it.

But while we rest this fundamental transaction, in point of authority, upon grounds the least liable to cavil, we are bound both in justice and gratitude to add, that it was conducted with a temper and moderation which naturally arose from its equity: that, however it might in some respects go beyond the letter of our ancient laws, the reason of which will more fully appear hereafter, it was agreeable to the spirit of our constitution, and the rights of human nature; and that though in other points, owing to the peculiar circumstances of things and persons, it was not altogether so perfect as might have been wished, yet from thence a new æra commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of the English history. In particular it is worthy observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of king James amounted

to an endeavour to subvert the constitution; and not to an actual subversion, or total dissolution, of the government, according to the principles of Mr. Locke, which would have reduced the society almost to a state of nature; would have levelled all distinctions of honour, rank, offices, and property; would have annihilated the sovereign power, and in consequence have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity. They therefore very prudently voted, it to amount to no more than *an abdication of the government, and a consequent vacancy of the throne; whereby the government was allowed to subsist, though the executive magistrate was gone, and the kingly office to remain, though king James was no longer king.* And thus the constitution was kept entire; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.

This single postulatam, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For, if the throne be at any time vacant, which may happen by other means besides that of abdication, as if the blood royal should fail without any successor appointed by parliament; if, I say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be entrusted; and there is a necessity of its being intrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such manner as they judged the most proper. And this was done by their declaration of 12 February, 1688, in the following manner: "that William and Mary, prince and princess of Orange, be, and be declared king and queen, to hold the crown and royal dignity during their lives, and the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said prince of Orange, in the names of the said prince and princess, during their joint lives: and after their deceases the said

crown and royal dignity to be to the heirs of the body of the said princess; and for default of such issue to the princess Anne of Denmark and the heirs of her body; and for default of such issue to the heirs of the body of the said prince of Orange."

Perhaps, upon the principles before established, the convention might, if they pleased, have vested the regal dignity in a family entirely new, and strangers to the royal blood: but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any further from the ancient line than temporary necessity and self-preservation required. They therefore settled the crown, first on king William and queen Mary, king James's eldest daughter, for their joint lives; then on the survivor of them; and then on the issue of queen Mary; upon failure of such issue, it was limited to the princess Anne, king James's second daughter, and her issue; and lastly, on failure of that, to the issue of king William, who was the grandson of Charles the first, and nephew as well as son-in-law of king James the second, being the son of Mary his eldest sister. This settlement included all the protestant posterity of king Charles I., except such other issue as king James might at any time have, which was totally omitted, through fear of a popish succession. And this order of succession took effect accordingly.

These three princes, therefore, king William, queen Mary, and queen Anne, did not take the crown by hereditary right or descent, but by way of donation or purchase, as the lawyers call it: by which they mean any method of acquiring an estate otherwise than by descent. The new settlement did not merely consist in excluding king James, and the person pretending to be prince of Wales, and then suffering the crown to descend in the old hereditary channel; for the usual course of descent was in some instances broken through; and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and king James had left no other issue than his two daughters queen Mary and queen Anne. It would have stood thus: queen Mary and her issue; queen Anne and her issue; king William and his issue. But we may remember, that queen Mary was only nomi-

nally queen, jointly with her husband king William, who alone had the regal power; and king William was personally preferred to queen Anne, though his issue was postponed to hers. Clearly, therefore, these princes were successively in possession of the crown by a title different from the usual course of descent.

It was towards the end of king William's reign, when all hopes of any surviving issue from any of these princes died with the duke of Gloucester, that the king and parliament thought it necessary again to exert their power of limiting and appointing the succession, in order to prevent another vacancy of the throne; which must have ensued upon their death, as no farther provision was made at the revolution, than for the issue of queen Mary, queen Anne, and king William. The parliament had previously, by the statute of 1 W. & M. st. 2. c. 2. enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, should profess the popish religion, or should marry a papist, should be excluded and for ever incapable to inherit, possess, or enjoy the crown; and that in such case the people should be absolved from their allegiance, and the crown should descend to such persons, being protestants, as would have inherited the same, in case the person so reconciled, holding communion, professing or marrying, were naturally dead. To act, therefore, consistently with themselves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the princess Sophia, electress and duchess dowager of Hanover, the most accomplished princess of her age*. For, upon the impending extinction of the protestant posterity of Charles the first, the old law of regal descent directed them to recur to the descendants of James the first; and the princess Sophia, being the youngest daughter of Elizabeth, queen of Bohemia, who was the daughter of James the first, was the nearest of the ancient blood royal, who was not incapacitated by professing the popish religion. On her, therefore, and the heirs of her body, being protestants, the remainder of

* Sandford, in his genealogical history, published A. D. 1677, speaking, p. 535. of the princesses Elizabeth, Louisa, and Sophia, daughters of the queen of Bohemia, says, the first was reputed the most learned, the second the greatest artist, and the last one of the most accomplished ladies in Europe.

the crown, expectant on the death of king William and queen Anne, without issue, was settled by statute 12 and 13 W. III. c. 2. And at the same time it was enacted, that whosoever should hereafter come to the possession of the crown, should join in the communion of the church of England, as by law established.

This is the last limitation of the crown that has been made by parliament; and these several actual limitations from the time of Henry IV. to the present, do clearly prove the power of the king and parliament to new model or alter the succession. And indeed it is now again made highly penal to dispute it; for by the statute 6 Ann. c. 7, it is enacted that if any person maliciously, advisedly, and directly, shall maintain, by writing or printing, that the kings of this realm, with the authority of parliament, are not able to make laws to bind the crown and the descent thereof, he shall be guilty of high treason; or if he maintain the same by only preaching, teaching, or advisedly speaking, he shall incur the penalties of a *præmunire*.

The princess Sophia dying before queen Anne, the inheritance thus limited descended on her son and heir king George the First; and, having on the death of the queen taken effect in his person, from him descended to his late majesty king George the Second; and from him to his grandson and heir, king George the Third*.

Hence it is easy to collect, that the title to the crown is at present hereditary, though not quite so absolutely hereditary as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was king Egbert; then William the Conqueror; afterwards in James the First's time the two common stocks united, and so continued till the vacancy of the throne in 1688: now it is the princess Sophia, in whom the inheritance was vested by the new king and parliament. Formerly the descent was absolute, and the crown went to the next heir without any restriction: but now upon the new settlement, the inheritance is conditional; being limited to such heirs only, of the body

* It can hardly be necessary to add that the crown has followed the same rules of descent in the two instances which have occurred since the above passage was written.

of the princess Sophia, as are protestant members of the church of England, and are married to none but protestants.

And in this due medium consists, I apprehend, the true constitutional notion of the right of succession to the imperial crown of these kingdoms. The extremes between which it steers, are each of them equally destructive of those ends for which societies were formed and are kept on foot. Where the magistrate, upon every occasion, is elected by the people, and may by the express provision of the laws be deposed, if not punished, by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties, which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent. It was the duty of an expounder of our laws to lay this constitution before the student in its true and genuine light: it is the duty of every good Englishman to understand, to revere, to defend it.

QUESTIONS.

In what King of the West Saxons did the union of the Heptarchy take place?

On what principle was founded the general acquiescence under the hereditary King of the West Saxons?

What was the state of the succession to the throne, between this King and Edmund Ironside—and how long was this period?

What happened to Edmund Ironside, and ensued on his death?

Who was Edward the Confessor, and how did he succeed to the throne?

How did Harold II.?

Who was Edgar Atheling?

On what pretext did William the Conqueror claim the English

Was William the Conqueror's or Harold's the better title to the throne?

What was the *constitutional* effect of the battle of Hastings?

Was William II. the rightful successor to his father?

Had Henry I. ever a good title to the throne? How did he acquire it?

Did Stephen succeed rightly to the throne?

Which has the preference of succession, the son of a daughter, or the daughter of a son?

What was Henry II.'s title to the throne?

How is the Saxon line said to have been restored in the person of Henry II.?

By what right did Richard I. succeed to the throne, and who succeeded him, and how?

Had Henry III. a strict title to the throne?

How did the crown descend from Henry III. to Richard II.—and through how many generations?

Who succeeded to Richard II., and under what circumstances?

How did the Duke of Lancaster make out his title to the throne?

Did the Parliament in the reign of Henry IV. entirely new model the succession to the throne? What was enacted? Who succeeded Henry IV.?

In whose reign did the house of York assert their right to the throne?

Was Edward IV. a York or a Lancaster?

What was the opinion of the Parliament of Edward IV. concerning the three Henrys?

Whom did Richard III. succeed, and by whom was he succeeded?

What was the nature of Henry VII.'s title?

In whom was the strict right to the crown when Henry VII. ascended the throne?

In what point did the caution of Henry VII.'s parliament resemble that of Henry IV.'s?

Did Henry VII. ever acquire a better title to the throne than that under which he had seized it?

Had Henry VIII. a strict title to the throne?

Were any attempts made in this King's reign to regulate the succession? And what occasioned them?

To whom did Henry VIII. transmit his crown?

Whom did Elizabeth succeed, and by whom was she succeeded?

Had James I. a valid title to the English crown?

Was there anything remarkable in the title of James I.? State it.

What did the Judges of Charles I. represent to him to be the nature of his rights ?

What great constitutional principle was asserted and solemnly recognised at the Restoration ?

What was the Bill of Exclusion ? What was its object, and did it attain that object ?

What led to the Revolution of 1688 ?

What kind of an abdication was that of James II. ?

On what principles did the nation act at that memorable period ?

Did the abdication of James II. lead to a destruction of the constitution, or to a mere vacancy of the throne ?

If the throne should ever become vacant, who must supply that vacancy ?

How was it supplied in 1688 ?

What was the settlement of the crown on that occasion ?

Did William, Mary, and Anne take the crown by hereditary descent ?

How would the succession have stood, had there been no abdication, and James II. had left no issue but Mary and Anne ?

What led the nation to settle the crown upon the Princess Sophia, Electress and Duchess Dowager of Hanover ?

What precautions were taken to secure a Protestant succession ?

Is it lawful now publicly to deny the right of the King and Parliament to new model or alter the succession ?

What was the last limitation of the crown made by Parliament ?

How did George I. succeed to the throne ?

What were the common stocks, or ancestors, from Egbert downwards ?

Who is now the common stock ?

Is the descent now as absolutely hereditary as formerly ?

THE KING'S ROYAL FAMILY.

THE first and most considerable branch of the king's royal family, regarded by the laws of England, is *THE QUEEN*.

The queen of England is either *Queen Regent*, *Queen Consort*, or *Queen Dowager*. The *queen regent, regnant, or sovereign*, is she who holds the crown in her own right ; as the first, and perhaps the second queen Mary, queen Elizabeth, and queen Anne ; and such an one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king. But the *queen consort* is the wife of the reigning king ; and she, by virtue of her marriage, is participant of divers prerogatives above other women.

And, first, she is a public person, exempt and distinct from the king ; and not like other married women, so closely connected as to have lost all legal or separate existence so long as the marriage continues. For the queen is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord ; which no other married woman can do : a privilege as old as the Saxon æra. She is also capable of taking a grant from the king, which no other wife is from her husband ; and in this particular she agrees with the *Augusta*, or *piissima regina conjux diri imperatoris* of the Roman laws ; who, according to Justinian, was equally capable of making a grant to, and receiving one from the emperor. The queen of England hath separate courts and offices distinct from the king's, not only in matters of ceremony, but even of law ; and her attorney and solicitor general are entitled to a place within the bar of his majesty's courts, together with the king's counsel. She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings

looked upon as a feme sole, and not as a feme covert, as a single, not as a married woman. For which the reason given by sir Edward Coke is this: because the wisdom of the common law would not have the king, whose continual care and study is for the public, and *circa ardua regni*, to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if, she was an unmarried woman.

Though the queen is in all respects a subject, yet, in point of the security of her life and person she is put on the same footing with the king. It is equally treason, by the statute 35 Edw. III., to compass or imagine the death of our lady the king's companion, as of the king himself; and to violate or defile the queen consort, amounts to the same high crime; as well in the person committing the fact, as the queen herself, if consenting. A law of Henry the eighth made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof; but this law was soon after repealed, it trespassing too strongly, as well on natural justice as female modesty. If, however, the queen be accused of any species of treason, she shall, whether consort or dowager, be tried by the peers of parliament, as queen Ann Boleyn was in 28 Henry VIII.

The husband of a queen regnant, as prince George of Denmark was to queen Anne, is her subject: and may be guilty of high treason against her: but, in the instance of conjugal infidelity, he is not subject to the same penal restrictions. For which the reason seems to be, that, if a queen consort is unfaithful to the royal bed, this may debase or bastardise the heirs to the crown; but no such danger can be consequent on the infidelity of the husband to a queen regnant.

A Queen Dowager is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death, nor to violate her chastity, for the same reason as was before alleged, because the succession to the crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special licence from the king, on pain of forfeiting his lands and goods. This sir Edward Coke tells us was enacted in parliament in 6 Henry VI., though the statute be not in print. But

she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is. A queen dowager, when married again to a subject, doth not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners. For Catherine, queen dowager of Henry V., though she married a private gentleman, Owen ap Meredith, ap Theodore, commonly called Owen Tudor; yet, by the name of Catherine queen of England, maintained an action against the bishop of Carlisle. And so the queen dowager of Navarre, marrying with Edmond earl of Lancaster, brother to king Edward the first, maintained an action of dower, after the death of her second husband, by the name of queen of Navarre.

The prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws. For, by statute 25 Edw. III., to compass or conspire the death of the former, or violate the chastity of either of the latter, are as much high treason as to conspire the death of the king, or violate the chastity of the queen. And this upon the same reason, as was before given; because the prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal with bastardy: and the eldest daughter of the king is alone inheritable to the crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters; insomuch that upon this, united with other (feodal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only. The heir apparent to the crown is usually made prince of Wales and earl of Chester, by special creation, and investiture; but being the king's eldest son, he is by inheritance duke of Cornwall, without any new creation.

The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were little farther regarded by the ancient law, than to give them a certain degree of precedence before all peers and public officers, as well ecclesiastical as temporal. This is done by the statute 31 Henry VIII., c. 10., which enacts, that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have prece-

dence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which sir Edward Coke explains to signify grandson or *nepos*), or brother's or sister's son. Therefore, after these degrees are past, peers, or others, of the blood-royal, are entitled to no place or precedence except what belongs to them by their personal rank or dignity.

In 1718, upon a question referred to all the judges by king George I., it was resolved by the opinion of ten against the other two, that the education and care of all the king's grandchildren, while minors, did belong of right to his majesty as king of this realm, even during their father's life. But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred, in opinion, that this care and approbation extended also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend, they did not find precisely determined. The most frequent instances of the crown's interposition go no farther than nephews and nieces; but examples are not wanting of its reaching to more distant collaterals. And now, by statute 12 Geo. III. c. 11., no descendant of the body of king Geo. II., other than the issue of princesses married into foreign families, is capable of contracting matrimony, without the previous consent of the king, signified under the great seal; and any marriage contracted without such consent is void. Provided, that such of the said descendants, as are above the age of twenty-five, may, after a twelvemonths' notice, given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present at, any such prohibited marriage, shall incur the penalties of the statute of *præmunire*.

QUESTIONS.

What is a Queen Regent? A Queen Consort?

In what respects does the wife of the King differ from the wife of a subject?

What reason does Lord Coke give for the peculiar character and privileges possessed by the Queen ?

Is the Queen a subject ?

How should a Queen be tried ?

Was Queen Anne married ?

What is a Queen Dowager ?

Is it high treason to conspire the death of a Queen Dowager ?

Why ?

Can a subject marry a Queen Dowager ?

Was there ever an instance of this in English history ?

Who is Prince of Wales ?

How does the law regard the Prince of Wales, his Consort, and the King's eldest daughter ? And the younger sons and daughters of the King ?

Who is entitled to the education and care of the King's grandchildren ?

What is the law concerning the marriage of the King's descendants.

THE KING'S COUNSELLORS.

IN order to assist the king in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with.

1. The first of these is the high court of parliament, which has been already treated at large.

2. Secondly, the peers of the realm are by their birth hereditary counsellors of the crown, and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament, or, which hath been their principal use, when there is no parliament in being.

Many instances of conventions of the peers to advise the king, are to be found under our ancient monarchs; though the formal method of convoking them had been, by reason of the more regular meetings of parliament, so long left off, that when king Charles I., in 1640, issued out writs under the great seal to call a great council of all the peers of England to meet and attend his majesty at York, previous to the meeting of the long parliament, the earl of Clarendon mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had *not been* practised in some hundreds of years. But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet, in cases of emergency, our princes have at several times thought proper to call for, and consult as many of the nobility as could easily be got together; as was particularly the case with king James the Second, after the landing of the prince of Orange; and with the prince of Orange himself, before he called that convention parliament, which afterwards called him to the throne.

Besides this general meeting, it is usually looked upon¹

to be the right of each particular peer of the realm to demand an audience of the king, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal.

3. A third council, belonging to the king, are, according to sir Edward Coke, his judges of the courts of law, for law matters.

4. But the principal council belonging to the king, is his privy council, which is generally called, by way of eminence, 'the council.' And this, according to sir Edward Coke's description of it, is a noble, honourable, and reverend assembly, of the king, and such as he wills to be his privy council, in the king's court or palace. The king's will is the sole constituent of a privy counsellor; and this also regulates their number, which of ancient time was twelve, or thereabouts. Afterwards, it increased to so large a number, that it was found inconvenient for secrecy and despatch; and therefore king Charles the Second, in 1679, limited it to thirty: whereof fifteen were to be the principal officers of state, and those to be counsellors, *virtute officii*; and the other fifteen were composed of ten lords and five commoners of the king's choosing. But since that time the number has been much augmented, and now continues indefinite. At the same time also the ancient office of lord president of the council was revived in the person of Anthony earl of Shaftesbury, an officer that, by the statute of 31 Hen. VIII. c. 10. has precedence next after the lord chancellor and the lord treasurer.

Privy counsellors are made by the king's nomination, without either patent or grant; and, on taking the necessary oaths, they become immediately privy counsellors during the life of the king that chooses them, but subject to removal at his discretion.

As to the qualifications of members to sit at this board; any natural-born subject of England is capable of being a member of the privy council; taking the proper oaths for security of the government, and the test for security of the church. But, in order to prevent any persons under foreign attachments from insinuating themselves into this important trust, as happened in the reign of king William in many instances, it is enacted by the act of settlement, that no person born out of the dominions of the crown of England, unless born of English parents, even though

naturalized by parliament, shall be capable of being of the privy council.

The duty of a privy counsellor appears from the oath of office, which consists of seven articles : 1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, meed, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of that which shall be there resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general, 7. To observe, keep, and do all that a good and true counsellor ought to do to his sovereign lord.

The power of the privy council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction herein is only to inquire, and not to punish ; and the persons committed by them are entitled to their *habeas corpus* by statute 16 Car. I. c. 10. as much as if committed by an ordinary justice of the peace. And, by the same statute, the court of star-chamber, and the court of requests, both of which consisted of privy counsellors, were dissolved ; and it was declared illegal for them to take cognizance of any matter of property, belonging to the subjects of this kingdom. But, in plantation or admiralty causes, which arise out of the jurisdiction of this kingdom ; and in matters of lunacy or ideocy, being a special flower of the prerogative ; with regard to these, although they may eventually involve questions of extensive property, the privy council continues to have cognizance, being the court of appeal in such cases ; or rather, the appeal lies to the king's majesty in council. Whenever also a question arises between two provinces in America, or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises original jurisdiction thereon, upon the principles of feudal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feudal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council ; as was the case of the earl of Derby, with regard to the Isle of Man, in the reign of queen Elizabeth, and the earl of Cardigan and others, as representatives of the duke of Montague, with

relation to the island of St. Vincent, in 1764. And from all the dominions of the crown, excepting Great Britain and Ireland, an appellate jurisdiction, in the last resort, is vested in the same tribunal; which usually exercises its judicial authority in a committee of the privy council*, who hear the allegations and proofs, and make their report to his majesty in council, by whom the judgment is finally given.

The dissolution of the privy council depends upon the king's pleasure; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law also it was dissolved *ipso facto* by the king's demise; as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted, by statute 6 Ann. c. 7, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.

* This judicial authority is now exercised by the "*Judicial Committee of the Privy Council*," the constitution and functions of which are defined by st. 3 & 4 W. 4. c. 41.

QUESTIONS

What are the functions of the Peers of the Realm?

What was a "Convention of Peers," and when adopted?

What privilege have the Peers personally with reference to the King?

What is the Privy Council?

How is a Privy Counsellor appointed?

What are the qualifications of a Privy Counsellor?

What are his duties? *

What kind of a jurisdiction is that of the Privy Council?

How is the Privy Council dissolved?

What becomes of it, on a demise of the Crown?

THE KING'S DUTIES.

IN consideration of the duties incumbent on the king by our constitution, his dignity and prerogative are established by the law of the land: it being a maxim in the law, that protection and subjection are reciprocal. And these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared king James had broken the original contract between king and people. Whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince who hath reigned since the year 1688:—for to obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 and 13 W. III. c. 2, “that the laws of England are the birthright of the people thereof; and all the kings and queens who shall ascend the ~~throne~~ of this realm ought to administer the government of the same according to the said laws: and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are ratified and confirmed accordingly.”

The terms of the original contract between king and people, I apprehend to be now couched in the Coronation Oath, which by the statute 1 W. & M. stat. 1. c. 6. is to be administered to every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms:

“*The archbishop or bishop shall say, Will you solemnly promise and swear to govern the people of this kingdom of*

England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same?—*The king or queen shall say, I solemnly promise so to do.—Archbishop or bishop.* Will you to your power cause law and justice, in mercy, to be executed in all your judgments?—*King or queen.* I will.—*Archbishop or bishop.* Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the protestant reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?—*King or queen.* All this I promise to do.—*After this the king or queen, laying his or her hand upon the holy gospels, shall say, The things which I have here before promised I will perform and keep: so help me God: and then shall kiss the book."*

QUESTIONS.

What are the reciprocal duties of the King and the People?

What is the original contract between them, and how was it defined after the Revolution, in the reign of William III.?

What is the Coronation Oath?

THE KING'S PREROGATIVE.

ONE of the principal bulwarks of civil liberty, or, in other words, of the British constitution, is the *limitation of the king's prerogative* by bounds so certain and notorious, that it is impossible he should ever exceed them without the consent of the people, on the one hand ; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject.

By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity.

The enormous weight of prerogative, if left to itself, as in arbitrary governments it is, spreads havoc and destruction among all the inferior movements ; but, when balanced and regulated, as with us, by its proper counterpoise, timely and judiciously applied, its operations are then equable and certain ; it invigorates the whole machine, and enables every part to answer the end of its construction.

Under every monarchical government, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from, and superior to, those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand ; yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law therefore ascribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain

attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we shall now proceed to examine.

I. And, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence. His realm is declared to be an empire, and his crown to be imperial, by many acts of parliament, particularly the statutes 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 28; which 'at the same time declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and, of consequence, inferior to no man upon earth, dependent on no man, accountable to no man. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, says Finch, shall command the king? Hence it is, likewise, that, by law, the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more; and, if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right, as a matter of grace, though not upon compulsion. And this is entirely consonant to what is laid

down by the writers on natural law. "A subject," says Puffendorf, "so long as he continues a subject, hath no way to oblige his prince to give him his due, when he refuses it, though no wise prince will ever refuse to stand to a lawful contract: and if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws; for the end of such action is not to compel the prince to observe the contract, but to persuade him." And, as to personal wrongs; it is well observed by Mr. Locke, "the harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able, by his single strength, to subvert the laws, nor oppress the body of the people, should any prince have so much weakness and ill nature as to endeavour to do it—the inconveniency, therefore, of some particular mischiefs, that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being thus set out of the reach of danger."

Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is, at the same time, a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

The supposition of law is, that neither the king nor either house of parliament, collectively taken, is capable of doing any wrong; since, in such cases, the law feels itself incapable of furnishing any adequate remedy. For which reason, all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule, or express legal provision: but, if ever they unfortunately happen, the prudence

of the times must provide new remedies upon new emergencies.

Indeed, it is found, by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims which were originally established to preserve it. And therefore, though the positive laws are silent, experience will furnish us with a very remarkable case, wherein nature and reason prevailed. When king James the Second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no farther, we may now be allowed to lay down the law of redress against public oppression. If, therefore, any future prince should endeavour to subvert the constitution, by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom; we are now authorised to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say that any one or two of these ingredients would amount to such a situation; for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent, though latent, powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

II. Besides the attribute of sovereignty, the law also ascribes to the king, *in his political capacity*, absolute perfection. *The king can do no wrong.* Which ancient and fundamental maxim is not to be understood as if every thing transacted by the government was of course just and lawful: but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is neces-

sary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

In the king also can be no stain or corruption of blood: for if the heir to the crown were attainted of treason, or felony, and afterwards the crown should descend to him, this would purge the attainer *ipso facto*. And therefore when Henry VII. who as earl of Richmond stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainer; because, as Lord Bacon in his history of that prince informs us, it was agreed that the assumption of the crown had at once purged all attainders. Neither can the king, in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one. It hath indeed been usually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian, or regent*, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of common law, that in the king is no minority; and therefore he hath no legal guardian.

III. A third attribute of the king's majesty is his perpetuity. The law ascribes to him, in his political capacity, an absolute immortality. *The king never dies.* Henry, Edward, or George, may die; but "THE KING" survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes.

We are next to consider those branches of the royal prerogative which invest thus our sovereign lord, thus all perfect and immortal in his kingly capacity, with a number

* The regency of this kingdom, in case of minority upon the demise of his present Most Gracious Majesty, is provided for by stat. 1 Will. IV. c. 2, by which the government will be entrusted to her royal highness the Duchess of Kent, in case the crown should devolve upon the Princess Alexandra Victoria during her minority. The majority of the princess is fixed at eighteen.

of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and to reduce them to one, is a work of more time and delay than the exigencies of state will afford. The king of England is not only the chief, but, properly, the sole, magistrate of the nation; all others acting by commission from, and in due subordination to, him; in like manner as, upon the great revolution of the Roman state, all the powers of the ancient magistracy of the commonwealth were concentrated in the new emperor: so that, as Gravina expresses it, "*in ejus unius persona veteris reipublicæ vis atque majestas per cumulatæ magistratuum potestates exprimebatur.*"

In the exertion of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account. For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner. Thus a king may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded.

With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and

ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of a whole nation: what is done without the king's concurrence is the act only of private men.

The king, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the controul of the private law of that state wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made: but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master, who is bound either to do justice upon him, or avow himself the accomplice of his crimes. It is also the king's prerogative to make *treaties*, *leagues*, and *alliances*, with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts, therefore, he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution, as was hinted before, hath here interposed a check, by the means of parliamentary impeachment, for the punishment of any such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.

Upon the same principle the king has also the sole prerogative of making war and peace. For it is held by the writers on the law of nature and nations, that the power of making war, which by nature subsisted in every individual, is given up by all private persons that enter

into society, and is vested in the sovereign power: and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding, a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

Upon exactly the same reason stands the prerogative of granting *safe-conducts*, without which, by the law of nations, no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves, that it is left in the power of all states to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coast by necessity, or by any cause that deserves pity or compassion. Great tenderness is shewn by our laws, not only to foreigners in distress, as will appear when we come to speak of shipwrecks, but with regard also to the admission of strangers who come spontaneously. For, so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though liable to be sent home, whenever the king sees occasion.

These are the principal prerogatives of the king respecting this nation's intercourse with foreign nations; in all of which he is considered as the delegate or representative of his people. But in domestic affairs he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

I. First, he is *a constituent part of the supreme legislative power*; and, as such, he has the prerogative of rejecting such provisions in parliament as he judges improper to be passed.

II. The king is considered, in the next place, as the *generalissimo, or the first in the military command, within the kingdom*. The great end of society is to protect the weakness of individuals by the united strength of the community: and the principal use of government is to direct that united strength in the best and most effectual manner,

to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose ; it follows, therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.

In this capacity, therefore, of general of the kingdom, the king has the sole power of raising and regulating fleets and armies.

III. Another capacity in which the king is considered in domestic affairs, is *as the fountain of justice and general conservator of the peace of the kingdom.* By the *fountain of justice* the law does not mean the author or original, but only the distributor. Justice is not derived from the king as from his free gift ; but he is the steward of the public to dispense it to whom it is due. He is, not the spring, but the reservoir ; from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at large : but, as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints ; and in England this authority has immemorially been exercised by the king or his substitutes. He, therefore, has alone the right of erecting courts of judicature : for though the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust : it is consequently necessary that courts should be erected, to assist him in executing this power ; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name ; they pass under his seal, and are executed by his officers.

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their

whole judicial power to the judges of their several courts; which are the grand depositories of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament. And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III. c. 2. that their commissions shall be made, not as formerly, *durante bene placito*, but *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law in the statute of Geo. III. c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown, which was formerly held immediately to vacate their seats, and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare, that "he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown."

In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity, if the king personally sat in judgment; because, in regard to these, he appears in another capacity, that of prosecutor. All offences are either against the king's peace, or his crown and dignity: and are so laid in every indictment. For though in their consequences they generally seem, except in the case of treason, and a very few others, to be rather offences against the kingdom than the king; yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far, in the old gothic constitution, wherein the king was bound by his coronation oath to

conserve the peace, that in case of any forcible injury offered to the person of a fellow subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath; *dicebatur fragisse juramentum regis juratum*. And hence also arises another branch of the prerogative, that of pardoning offences; for it is reasonable, that he only who is injured should have the power of forgiving. Prosecutions and pardons are here mentioned in this cursory manner, only to shew the constitutional grounds of this power of the crown, and how regularly connected all the links are in this vast chain of prerogative.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative.

A consequence of this prerogative is the legal ubiquity of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. His judges are the mirror by which the king's image is reflected. *It is the regal office, and not the royal person, that is always present in the court*, always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. And from this ubiquity it follows, that the king can never be nonsuited; for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings the king is not said to appear by his attorney, as other men do, for, in contemplation of law, he is always present in court.

IV. *The king is likewise the fountain of honour, of office, and of privilege*: and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that govern-

ment can be maintained without a due subordination of rank; that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions: and the law supposes that no one can be so good a judge of their several merits and services, as the king himself who employs them. It has therefore intrusted with him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. And therefore all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown: either expressed in writing, by writs or letters patent, as in the creations of peers and baronets; or by corporeal investiture, as in the creation of a simple knight.

V. As money is the medium of commerce, it is the king's prerogative, *as the arbiter of domestic commerce*, to give it authority or make it current.

The coining of money is in all states the act of the sovereign power; and the stamping thereof is the unquestionable prerogative of the crown.

The denomination, or value for which the coin is to pass current, is likewise in the breast of the king; and if any unusual pieces are coined, that value must be ascertained by proclamation. The king may also, by his proclamation, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments. He may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current.

The king is, *lastly*, considered by the laws of England as *the head and supreme governor of the national church*.

To enter into the reasons upon which this prerogative is founded is matter rather of divinity than of law. I shall therefore only observe, that by statute, 26 Hen. VIII. c. 1, reciting that the king's majesty, justly and rightfully, is, and ought to be, the supreme head of the church of England; and so had been recognised by the clergy of this kingdom in their convocation, it is enacted, that the king shall be reputed the only supreme head on earth of the church of England. And another statute to the same purport was made, 1 Eliz. c. 1.

In virtue of this authority the king convenes, prorogues

restrains, regulates, and dissolves all ecclesiastical synods or convocations.

The *convocation*, or ecclesiastical synod, in England, differs considerably in its constitution from the synods of other christian kingdoms: those consisting wholly of bishops; whereas, with us, the convocation is the miniature of a parliament, wherein the archbishop presides with regal state; the upper house of bishops represents the house of lords; and the lower house, composed of representatives of the several dioceses at large, and of each particular chapter therein, resembles the house of commons with its knights of the shire and burgesses. This constitution is said to be owing to the policy of Edward I.; who thereby, at one and the same time, let in the inferior clergy, to the privileges of forming ecclesiastical canons, which before they had not, and also introduced a method of taxing ecclesiastical benefices, by consent of convocation.

From this prerogative also, of being the head of the church, arises the king's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments; which will be more properly considered when we come to treat of the clergy. I shall only here observe, that this is now done in consequence of the statute 25 Hen. VIII. c. 20.

As head of the church, the king is likewise the dernier resort in all ecclesiastical causes; an appeal lying ultimately to him in chancery from the sentence of every ecclesiastical judge.

QUESTIONS.

What is the King's Prerogative?

What is meant by the limitation of it?

What do you understand by "*The Royal Dignity*?"

Is the king Supreme Head, in matters both ecclesiastical and civil?

Can any action or suit be brought against the King? Why?

If the King's conduct were tyrannical, is his *person* nevertheless sacred?

If a subject has a demand against the King in respect of property, has he any way of enforcing it?

What do you mean by the phrase "*The King can do no wrong*?"

What is the responsibility of the King's Ministers?

Can there be any stain or corruption of blood in the King?

How did this principle operate in the case of Henry VII. ?

Can the King, as king, ever be treated as a *minor* ?

What inference is to be drawn from the appointment of a Protector, or Regent ?

What do you mean by the phrase "*The King never dies* ? "

Who is the chief or sole Magistrate ?

Who will be answerable for the misuse of the Royal Prerogative ?

What is the King's character and capacity with regard to foreign concerns ? On what principle is this ?

What is the king's power with reference to sending and receiving Ambassadors ?

Who makes foreign treaties, leagues, and alliances ?

Who is answerable for a dishonourable and disadvantageous treaty ?

Who has the absolute power of making War and Peace ?

What are " safe conducts ? "

Has the King any power to reject a Bill sent up from Parliament ?

How does the King stand with reference to the Army ?

In what sense is the King called the " Fountain of Justice ? "

Why is it that legal proceedings are generally in the King's name, under his seal, and executed by his officers ?

What measures did Wm. III. and Geo. III. take to secure the independence of the Judges ?

Can the King personally sit in judgment ?

Is the Administration of Justice separated from the legislative and executive power ? On what principle ?

What do you understand when you are told that the King is always present in all his courts ?

Who has the sole power of conferring nobility, knighthood, and other titles of distinction ?

Who has the exclusive power and controul over the coinage of the realm ?

In what relation does the King stand to the Church of England ?

What is the Convocation ?

Who has the ultimate decision of ecclesiastical causes ?

SHERIFFS,—CORONERS,—JUSTICES OF THE PEACE,—
CONSTABLES.

I. THE sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, *recheſerefa*, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*; to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls, in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden: reserving to themselves the honour, but the labour was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to the earl; the king, by his letters patent, committing *custodiam comitatus* to the sheriff, and him alone.

The Sheriff's power and duty are, either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

In his judicial capacity he is to hear and determine all causes of forty shillings' value and under, in his county court, and he has also a judicial power in divers other civil cases, which has been lately very greatly increased. He is likewise to decide the elections of knights of the shire (subject to the controul of the house of commons), of coroners, and of verderors; to judge of the qualification of voters, and to return such as he shall determine to be duly elected.

As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office. He may apprehend and commit to prison all persons who break the peace, or attempt to break it; and may

bind any one in recognizance to keep the king's peace. He may, and is bound *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county: and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment. But though the sheriff is thus the principal conservator of the peace in his county, yet, by the express directions of the great charter, he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as ordinary justice of the peace during the time of his office: for this would be equally inconsistent; he being in many respects the servant of the justices.

In his ministerial capacity, the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.

As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whose territory was divided into bailiwicks, as that of England into counties. He must seize to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to

some subject ; and must always collect the king's rents within the bailiwick, if commanded by process from the exchequer.

To execute these various offices, the sheriff has under him many inferior officers ; an under-sheriff, bailiffs, and gaolers ; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*.

II. The CORONER'S is also a very ancient office at the common law. He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned. And in this light the lord chief justice of the king's bench is the principal coroner in the kingdom, and may, if he pleases, exercise the jurisdiction of a coroner in any part of the realm. But there are also particular coroners for every county of England ; usually four, but sometimes six, and sometimes fewer. This officer is of equal antiquity with the sheriff ; and was ordained, together with him, to keep the peace, when the earls gave up the wardship of the county.

He is still chosen by all the freeholders in the county court ; as by the policy of our ancient laws the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people. And it was enacted by the statute of Westm. 1., that none but lawful and discreet knights should be chosen ; and there was an instance in the 5 Edw. III., of a man being removed from this office, because he was only a merchant. But it seems it is now sufficient if a man hath lands enough to be made a knight, whether he be really knighted or not : for the coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour ; and if he hath not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer. Now, indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands ; so that, although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid statute of Westm. 1., expressly forbidden to take a reward, under pain of a great forfeiture to the king ; yet for many years past they have only desired to

be chosen for the sake of their perquisites ; being allowed fees for their attendance by the statute 3 Hen. VII. c. 1, which sir Edward Coke complains of heavily ; though since his time those fees have been much enlarged.

The coroner is chosen for life ; but may be removed, either by being made sheriff, or chosen verderor, which are offices incompatible with the other ; or by the king's writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part in it. And by the statute 25 Geo. II. c. 29, extortion, neglect, or misbehaviour, are also made causes of removal.

The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial ; but principally judicial. This is in a great measure ascertained by statute 4 Edw. I. *de officio coronatoris* ; and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis* ;" for, if the body be not found, the coroner cannot sit. He must also sit at the very place where the death happened : and his inquiry is made by a jury from four, five, or six of the neighbouring towns, over whom he is to preside. If any be found guilty, by this inquest, of murder or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby ; but, whether it be homicide or not, he must inquire whether any deodand has accrued to the king, or the lord of the franchise, by this death : and must certify the whole of this inquisition, under his own seal and the seals of his jurors, together with the evidence thereon, to the court of king's bench, or the next assizes. Another branch of his office is to inquire concerning shipwrecks ; and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure ; "and that may be well perceived (saith the old statute of Edw. I.) where one liveth riotously, haunting taverns, and hath done so of long time ;" whereupon he might be attached, and held to bail, upon this suspicion only.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality, as that he is interested in the suit, or of kindred to either plaintiff or defendant, the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs.

III. The next species of subordinate magistrates, whom I am to consider, are justices of the peace; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law, for the maintenance of the public peace. Of these, some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute officii*, still continue; but the latter sort are superseded by the modern justices.

The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it, hence it is usually called the king's peace. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, the lord high constable of England (when any such offices are in being), and all the justices of the court of king's bench, by virtue of their offices, and the master of the rolls, by prescription, are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it; the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county; as is also the sheriff; and both of them may take a recognizance or security for the peace. Constables, tything-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace and commit them, until they find sureties for their keeping it.

Those that were, without any office, simply and merely

conservators of the peace, either claimed that power by prescription: or were bound to exercise it by the tenure of their lands; or, lastly, were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis.*" But when queen Isabel, the wife of Edward II., had contrived to depose her husband by a forced resignation of the crown, and had set up his son, Edward III. in his place; this being a thing then without example in England, it was feared, would much alarm the people; especially as the old king was living, though hurried about from castle to castle, till at last he met with an untimely death. To prevent therefore, any risings, or other disturbance of the peace, the new king sent writs to all the Sheriffs in England, the form of which is preserved by Thomas Walsingham, giving a plausible account of the manner of his obtaining the crown; to wit, that it was done, *ipsius patris bene placito*: and withal commanding each sheriff, that the peace be kept throughout his bailiwick, on pain and peril of disinherittance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament, that for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the country, should be "assigned" to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people, and given to the king; this "assignment" being construed to be, by the king's commission. But still they were called only conservators, wardens, or keepers of the peace, till the statute 34 Edward III. c. 1. gave them the power of trying felonies; and then they acquired the more honourable appellation of justices.

These justices are appointed by the king's special commission under the great seal, the form of which was settled by all the judges, A. D. 1590. This appoints them all, jointly and severally to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanours; in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "*quorum aliquem vestrum, A. B. C. D. &c. unum esse volumus*;" whence the

persons so named are usually called justices of the *quorum*. And formerly, it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum*; but now, the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except, perhaps only some one inconsiderable person for the sake of propriety; and no exception is now allowable, for not expressing in the form of warrants, &c. that the justice who issued them is of the *quorum*. When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem*, from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him; which done, he is at liberty to act.

Touching the number and qualifications of these justices; it was ordained by statute 18 Edw. III. c. 2, that two or three, of the best reputation in each county, shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. III. c. 1, that one lord, and three, or four, of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary, by statute 12 Ric. II. and 14 Ric. II. c. 11, to restrain them, at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be, as Lambard observed long ago, that the growing number of statute laws, committed from time to time to the charge of justices of the peace, have occasioned also, and very reasonably, their increase to a larger number. And, as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county: and the statute 13 Ric. II. c. 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. V. st. 1, c. 4, and st. 2, c. 1, they must be resident in their several counties. And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11, that no justice should be put in commission, if he had not lands to the value of 20*l.* per annum. And, the rate of money being greatly altered since

that time, it is now enacted by statute 5 Geo. II. c. 18, that every justice, except as is therein excepted, shall have 100*l.* per annum, clear of all deductions; and, if he acts without such qualification, he shall forfeit 100*l.* This qualification is almost an equivalent to the 20*l.* per annum required in Henry the sixth's time; and of this the justice must now make oath. Also it is provided by the act 5 Geo. II. that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace.

As the office of these justices is conferred by the king, so it subsists only during his pleasure; and is determinable, 1. By the demise of the crown: that is, in six months after. But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh; nor, by reason of any new commission, to take the oaths more than once in the same reign. 2. By express writ under the great seal, discharging any particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession of the office of sheriff or coroner. Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission; but now it is provided, that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

The power, office, and duty, of a justice of the peace, depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences; which is the ground of their juris-

diction at sessions. And as to the powers given to one, two, or more justices, by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand the office; they are such, and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without any sinister views of his own will engage in this troublesome service. And therefore, if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office; which, among other privileges, prohibit such justices from being sued for any oversights, without notice beforehand; and stop all suits begun, on tender made of sufficient amends. But on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs.

I shall next consider some officers of lower rank than those which have gone before, and of more confined jurisdiction; but still such as are universally in use through every part of the kingdom.

IV. Fourthly, then, of the constable. The word *constable* is frequently said to be derived from the Saxon *koning-rtapel*, and to signify the support of the king. But as we borrowed the name as well as the office of constable from the French, I am rather inclined to deduce it, with sir Henry Spelman and Dr. Cowel, from that language; wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire: so called, because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback. This great office of lord high constable hath been disused in England, except only upon great and solemn occasions, as the king's coronation and the like, ever since the attainder of Stafford, duke of Buckingham, under king Henry VIII.; as in France it was suppressed, about a century after, by an edict of Louis XIII; but from his office, says Lambard, this lower constablenesship was at first drawn and fetched, and is as it

were a very finger of that hand. For the statute of Winchester*, which first appoints them, directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to arms and armour.

Constables are of two sorts, high constables and petty constables. The former were first ordained by the statute of Winchester, as before mentioned; are appointed at the courts leet of the franchise or hundred over which they preside, or, in default of that, by the justices at their quarter sessions; and are removable by the same authority that appoints them. The petty constables are inferior officers in every town and parish, subordinate to the high constable of the hundred, first instituted about the reign of Edward III. These petty constables have two offices united in them; the one ancient, the other modern. Their ancient office is that of headborough, tithing-man, or borsholder, of whom we formerly spoke, and who are as ancient as the time of king Alfred: their more modern office is that of constable merely; which was appointed, as was observed, so lately as the reign of Edward III., in order to assist the high constable. And in general the ancient headboroughs, tithing-men, and borsholders, were made use of to serve as petty constables; though not so generally, but that in many places they still continue distinct officers from the constable. They are all chosen by the jury at the court leet: or, if no court leet be held, are appointed by two justices of the peace.

The general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts; and to that purpose they are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like: of the extent

* We are disposed to think that the origin of this office will be found to be more ancient than the statute of Winchester or Winton, which was passed in the 13th year of the reign of Edward I.: for statute 14 Henry III., enacts as follows: "In qualibet villâ sit unus *constabularius* ad querum summonitionem omnes jurati in wardâ suâ conveniant." And statute 26 Henry III., which partly resembles the statute of Winton, enacts, "In singulis villis constituantur unus vel duo *constabularii*. In singulis vero hundredis unus *capitalis constabularius* ad cujus mandatum omnes jurati ad arma de hundredo conveniant, et ei sint intendentes ad faciendum ea quæ spectant ad conservationem pacis."

of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance. With regard to the infinite number of minute duties, that are laid upon constables by a diversity of statutes, I must refer to Mr. Lambard and Dr. Burn; in whose compilations may be also seen, what powers and duties belong to the constable or tithing-man indifferently, and what to the constable only: for the constable may do whatever the tithing-man may; but it does not hold, *e converso*, the tithing-man not having an equal power with the constable.

QUESTIONS.

What is the etymology of the word "Sheriff," and the signification of the word?

What is the duty of the Sheriff in his judicial capacity? As keeper of the King's peace?

May a Sheriff be an ordinary Justice of the Peace during the time of his office?

What is his duty as the ministerial officer of the Courts of Justice? As the King's bailiff?

What is the meaning of the word "Coroner," and what are the duties of that Officer?

Is the Lord Chief Justice of the Court of King's Bench a Coroner?

How many Coroners are there generally for each county?

Is the Coroner's an ancient office?

How is he chosen? Why?

How long does his office last?

Is his duty chiefly ministerial, or judicial?

What is the signification of the phrase, "*The King's Peace*?"

Who are keepers of the King's peace, *virtute officii*?

Were Justices of the Peace ever appointed otherwise than by the Crown?

Explain the change that was effected?

How are Justices of the Peace now appointed?

What is "*The Quorum*?"

What estate or property must one have to be qualified to act as a Justice of the Peace?

What puts an end to the office of Justice of the Peace?

How are these Officers protected from being harassed by lawsuits for petty errors and slips?

What is supposed to be the derivation of the word "Constable?"

What is a "High Constable," and what a "Petty Constable?" and how were they appointed?

How are they now chosen?

THE PEOPLE.

ALLEGIANCE—NATURAL-BORN SUBJECTS—ALIENS—

* DENIZENS—NATURALIZATION.

THE first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king: and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord and defend him against all his enemies. This obligation on the part of the vassal was called his *fidelitas* or fealty; and an oath of fealty was required, by the feudal law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our ancient oath of allegiance; except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and when the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: *contra omnes homines fidelitatem fecit.* But with us in

England, it becoming a settled principle of tenure, that all lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy, the term *allegiance* was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years, contained a promise "to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom." Upon which sir Matthew Hale makes this remark; that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But, at the revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear true allegiance to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists. And the oath of allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county.

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights and bound to all the duties of sovereignty, before his coronation; so the subject is bound to his prince, by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance. The formal profession therefore, or oath of subjection, is

nothing more than a declaration in words of what was before implied in law. The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the social tie by uniting it with that of religion.

Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For immediately upon their birth they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince.

Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection; and it ceases, the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local, temporary only: and that, for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince.

that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence; and, in point of locality, to the dominions of the British empire.

This allegiance then, both express and implied, is the duty of all the king's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguished by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehaviour; the explanation of which rights is the principal subject of the two first books of these commentaries. The same is also, in some degree, the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall, however, here endeavour to chalk out some of the principal lines, whereby they are distinguished from natives.

An alien born may purchase lands, or other estates; but not for his own use; for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that which he owes to his own natural liege lord; besides, that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Yet, an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation; for personal estate is of a transitory and moveable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people. Also an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate.

When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights,

no privileges, unless by the king's special favour, during the time of war.

When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood, with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions; so that a particular act of parliament became necessary after the restoration, "for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two allegiances, or serve two masters at once. Yet the children of the king's ambassadors born abroad were always held to be natural-born subjects; for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held, by a kind of *postliminium*, to be born under the king of England's allegiance, represented by his father, the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born abroad, provided both their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England; and accordingly it hath been so adjudged in behalf of merchants. But, by several more modern statutes these restrictions are still farther taken off; so that all children born out of the king's ligeance, whose fathers, or grandfathers, by the father's side, were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond seas, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain.

The children of aliens born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such.

■ A denizen is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject; a high and incommunicable branch of the royal prerogative. A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance;

for his parent, through whom he must claim, being an alien, had no inheritable blood ; and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born before denization, cannot inherit to him ; but his issue born after, may. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the crown.

Naturalisation cannot be performed but by act of parliament, for by this, an alien is put in exactly the same state as if he had been born in the king's ligeance, except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, &c.

QUESTIONS.

What is the distinction between *aliens* and *natural-born subjects* ?

What is *allegiance* ?

On what feudal principles does 'allegiance' depend ?

To whom, and when, may the oath of allegiance be tendered ?

Is the taking of the oath of allegiance necessary to create the duty of allegiance ?

If an Englishman were to remove to China, and remain there forty years, would his duty of allegiance to the King of England, cease ?

What is natural allegiance ?

Can natural allegiance be put off, by a natural-born subject ?

What is local allegiance ?

State the distinction between these two kinds of allegiance ?

Can an alien purchase and enjoy real property in this country ? Why ?

Is this the case with personal property ?

If an Ambassador of the King of Great Britain has children born abroad, are they natural-born subjects of the King of Great Britain ?

On what principle ?

What is the general rule as to the children of British subjects born abroad ?

What is the character, and what are the claims, of the children of aliens, born in Great Britain ?

What is a *Denizen* ? What are his privileges ?

How is *Naturalisation* performed ?

THE CLERGY.

THE people, whether aliens, denizens, or natural-born subjects, are divisible into two kinds ; the clergy and laity : the clergy, comprehending all persons in holy orders, and in ecclesiastical offices, will be the subject of the following chapter.

This venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the services of Almighty God, have thereupon large privileges allowed them by our municipal laws. A clergyman cannot be compelled to serve on a jury, nor to appear at a court-leet or view of frank-pledge ; which almost every other person is obliged to do : but if a layman is summoned on a jury, and before the trial take orders, he shall notwithstanding appear and be sworn. Neither can he be chosen to any temporal office, as bailiff, reeve, constable, or the like ; in regard of his own continual attendance on the sacred functions ; during his attendance on divine service he is privileged from arrest in civil suits. But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen, are incapable of sitting in the house of commons ; and by statute 21 Henry VIII.^{c.} 13, are not, in general, allowed to engage in any manner of trade, nor sell any merchandise. Which prohibition is consonant to the canon law*.

In the frame and constitution of ecclesiastical polity there are divers ranks and degrees : which I shall consider in their respective order.

An archbishop or bishop is elected by the chapter of his cathedral church, by virtue of a licence from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all christendom ;

* This statute is repealed by 57 Geo. III. c. 99, which contains, however, very similar provisions.

and this was promiscuously performed by the laity as well as the clergy; till at length it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the emperor Charlemagne, A.D. 773, by pope Hadrian I., and the council of Lateran, and universally exercised by other christian princes: but the policy of the court of Rome, at the same time, began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct nomination. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*; by the prince's delivering to the prelate a ring, and pastoral staff or crosier: pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them. This was a bold step towards effecting the plan then adopted by the Roman see of rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* and not *per annulum et baculum*; and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for awhile its other pretensions.

This concession was obtained from king Henry the First, in England, by means of that obstinate and arrogant prelate, archbishop Anselm : but king John, about a century afterwards, in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops : reserving only to the crown the custody of the temporalities during the vacancy ; the form of granting a licence to elect, which is the original of our *conge d'élire*, on refusal whereof the electors might proceed without it ; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause. This grant was expressly recognised and confirmed in king John's *magna charta*, and was again established by statute 25 Edw. III. st. 6.

But by statute 25 Hen. VIII. c. 20, the ancient right of nomination was, in effect, restored to the crown : it being enacted that, at every future avoidance of a bishopric, the king may send the dean and chapter his usual licence to proceed to election ; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect : and, if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may, by letters patent, appoint such person as he pleases. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire* *.

An archbishop is the chief of the clergy in a whole province, and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has also his own diocese, wherein he exercises episcopal jurisdiction ; as in his province he exercises archiepiscopal. As archbishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation ; but without the king's writ he cannot assemble them. To him all appeals are made from inferior jurisdictions within his province :

* A *præmunire* is a sentence by which all the delinquent's goods are forfeited to the crown, and his body is to lie in prison during the king's pleasure.

and, as an appeal lies from the bishops in person to him in person, so it lies also from the consistory courts of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the king is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the reformation. The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months.

It is likewise the privilege, by custom, of the archbishop of Canterbury to crown the kings and queens of this kingdom. And he hath also by the statute 25 Hen. VIII. c. 21, the power of granting dispensations in any case, not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them: which is the foundation of his granting special licences, to marry at any place or time, to hold two livings, and the like; and on this also is founded the right he exercises of conferring degrees, in prejudice of the two universities.

The power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation, by ecclesiastical censures. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university. It is also the business of a bishop to institute, and to direct induction to all ecclesiastical livings in his diocese.

Archbishoprics and bishoprics may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior. Therefore a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself.

II. A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also

in the temporal concerns of his see. When the rest of the clergy were settled in the several parishes of each diocese, as hath formerly been mentioned, these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend ten canons or prebendaries.

All ancient deans are elected by the chapter, by *consecration* from the king, and letters missive of recommendation: in the same manner as bishops: but in those chapters that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery is donative, and the installation merely by the king's letters patent. The chapter, consisting of canons and prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes by each other.

Deaneries and prebends may become void, like a bishopric, by death, by deprivation, or by resignation to either the king or the bishop. Also I may here mention, once for all, that if a dean, prebendary, or other spiritual person be made a bishop, all the preferments of which he was before possessed are void; and the king may present to them in right of his prerogative royal. But they are not void by the election, but only by the consecration.

III. An archdeacon hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it*. He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his. He therefore visits the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance.

IV. The rural deans are very ancient officers of the church, but almost gone out of use; though their deaneries still subsist as an ecclesiastical division of the diocese or archdeaconry. They seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and

* There is, we believe, no instance remaining of the former class of archdeacons.

report dilapidations, and to examine the candidates for confirmation, and armed, in minuter matters, with an inferior degree of judicial and coercive authority.

V. The next, and indeed the most numerous, order of men, in the system of ecclesiastical polity, are the parsons and vicars of churches: in treating of whom I shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, show how one may cease to be either.

A parson, *persona ecclesiæ*, is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an inviolable body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the church, which he personates, by a perpetual succession. He is sometimes called the rector, or governor of the church: but the appellation of parson, however it may be depreciated by familiar, clownish, and indiscriminate use, is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one, Sir Edward Coke observes, and he only, is said *vicem seu personam ecclesiæ gerere*. 'A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes appropriated; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private gentleman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions for the increase of their own power and emoluments. At the first establishment of the parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and their division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to

the use of their own fraternities, the endowment of which was construed to be a work of the most exalted piety, subject to the burthen of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the uses of their own corporation. But in order to complete such appropriation effectually, the king's licence, and consent of the bishop, must first be obtained; because both the king and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies; and also because the law reposes a confidence in them, that they will not consent to any thing that shall be to the prejudice of the church. The consent of the patron is also necessarily implied; because, as was before observed, the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church. When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons.

In this manner, and subject to these conditions, may appropriations be made at this day: and thus were most, if not all, of the appropriations at present existing originally made; being annexed to bishoprics, prebends, religious houses, nay even to nunneries and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries by statutes 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13. the appropriations of the several parsonages which belonged to those respective religious houses, amounting to more than one-third of all the parishes in England, would have been, by the rules of the common law, disappropriated; had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, &c. formerly held the same, at the time of their

dissolution. This, though perhaps scarcely defensible, was not without example; for the same was done in former reigns, when the alien priories, that is, such as were filled by foreigners only, were dissolved and given to the crown. And from these two roots have sprung all the lay appropriations of secular parsonages which we now see in the kingdom; they having been afterwards granted out from time to time by the crown.

These appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or VICAR. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere*. But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose. And therefore by statute 4 Hen. IV. c. 12, it is ordained that, the vicar shall be perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality. The endowments in consequence of these statutes have usually been by a portion of the glebe, or land, belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect, and which are therefore generally called small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed; and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.

The distinction therefore of a parson and vicar is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish: but a vicar has generally an appropriator over him, entitled to the best part of the

profits; to whom he is in effect perpetual curate, with a standing salary.

The method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. By common law, a deacon of any age, might be instituted and inducted to a parsonage or vicarage: but now, by statute 13 & 14 Car. II. c. 4, no person is capable to be admitted to any benefice, unless he hath been first ordained a priest, and then he is, in the language of the law, a clerk in orders.

Any clerk may be presented to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. But when a clerk is presented, the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days. Or, 2. If the clerk be unfit: which unfitness is of several kinds. First, with regard to his person; as if he be illegitimate, an outlaw, an excommunicate, an alien, under age, or the like. Next with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*. Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk.

If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk. When the ordinary is also the patron, and confers the living, the presentation and institution are one and the same act, and are called a collation to a benefice. Upon institution also the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like: and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to

whom their tithes are to be paid. This therefore is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsonee.

We have seen that there is but one way whereby one may become a parson or vicar: there are many ways by which one may cease to be so. 1. By death. 2. By cession, in taking another benefice. For by statute 21 Hen. VIII. c. 13, if any one having a benefice of eight pounds per annum, or upwards, according to the present valuation in the king's books, accepts any other, the first shall be adjudged void, unless he obtains a dispensation. And a vacancy thus made, for want of a dispensation, is called cession. 3. By consecration; for, as was mentioned before, when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated. But there is a method, by the favour of the crown, of holding such living in *commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual. being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. 4. By resignation. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made. 5. By deprivation, either, first, by sentence declaratory in the ecclesiastical court, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony, or conviction of other infamous crime in the king's courts; for heresy, infidelity, gross immorality, and the like: or, secondly, in pursuance of divers penal statutes, which declare the benefice void for some nonfeasance or neglect, or else some malefeasance or crime, as, for simony.

VI. A curate is the lowest degree in the church; being in the same state that a vicar was formerly, an officiating temporary minister, instead of the proper incumbent. Though there are what are called perpetual curacies, where all the tithes are appropriated, and no vicarage endowed, (being for some particular reasons exempted from the statute of Hen. IV.), but, instead thereof, such perpetual curate is appointed by the appropriator.

Thus much of the clergy, properly so called. There are also certain inferior ecclesiastical officers of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers. On which officers I shall make a few cursory remarks.

VII. Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish. They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken, in favour of the church, to be, for some purposes, a kind of corporation at the common law: that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Their office also is to repair the church, and make rates and levies for that purpose; but these are recoverable only in the ecclesiastical court. They are also joined with the overseers in the care and maintenance of the poor. They are to levy a shilling forfeiture on all such as do not repair to church on Sundays and holidays, and are empowered to keep all persons orderly while there; to which end it has been held that a churchwarden may justify the pulling off a man's hat, without being guilty of either an assault or trespass. There are also a multitude of other petty parochial powers committed to their charge by divers acts of parliament.

VIII. Parish clerks and sextons are also regarded by the common law, as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot be deprived, by ecclesiastical censures*. The parish clerk was formerly very frequently in holy orders, and some are so to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants.

* The commentator only meant by this, that the ecclesiastical court cannot deprive *in toto*: for it is thought that the incumbent may remove the clerk for sufficient cause. "He certainly," said lord Mansfield, "holds his office *quandiu se bene gesserit*." *R. v. Warren*, Cowp. 371.

QUESTIONS.

Can a Clergyman be a Juryman? A sheriff? A constable?

Can he engage in trade?

How is an Archbishop, or Bishop, elected?

What led to the interference of Kings in the nomination of these ecclesiastical officers ?

What was the origin of the *conge d'elire* ?

How is the right of nomination now exercised by the crown ?

What is the penalty attached to a disregard of the nomination of the crown ?

What are the duties and powers of an Archbishop ?

Who crowns the Kings and Queens of Great Britain ?

What is the duty of a bishop ?

How may an Archbishopric or Bishopric become void ?

What are the "Dean and Chapter ?" How elected ?

What becomes of the preferments of a spiritual person when he is made a Bishop ?

What is an Archdeacon, how appointed, and what are his functions ?

What are Rural Deans ?

What is a Parson—and from what is the word derived ?

Who has the freehold of the parsonage-house, the glebe, and tithes, &c. ?

What are appropriators ? State their history ?

What is a "Vicar ?

To whom do great tithes, and small tithes belong ?

What is the distinction between a Parson and a Vicar ?

What are the four requisites in order to become a Parson or Vicar ?

What is necessary before a Deacon can be made a Parson or Vicar ?

What is a *collation to a benefice* ?

What is *Induction*—and how performed ?

How may a Parson, or Vicar, cease to be such ?

What is holding a living *in commendam* ?

What is the lowest degree in the church ?

What are Churchwardens ? How appointed ? What are their general duties ?

Who are Parish-Clerks and Sextons ?

THE CIVIL STATE.

NOBILITY—KNIGHTHOOD—BARONETCY—ESQUIRES—
GENTLEMEN.

THE civil state consists of the nobility and the commonalty. The nobility, the peerage of Great Britain, or lords temporal—as forming, together with the bishops, one of the supreme branches of the legislature—we are here to consider according to their several degrees or titles of honour.

All degrees of nobility and honour are derived from the king, as their fountain*; and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons†.

1. A duke, though he is with us, in respect of his title of nobility, inferior, in point of antiquity, to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family. Among the Saxons, the Latin name of dukes, *duces*, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called *Deputozæ*; and in the laws of Hen. I., as translated by Lambard, we find them called *heretochii*. But after the Norman conquest, which changed the military polity of the nation, the kings themselves continuing for many generations dukes of Normandy, they would not honour any subjects with the title of duke; till the time of Edward III.; who, going to be king of France, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign created his son, Edward the Black Prince, duke of Corn-

* 4 Inst. 363.

† For the original of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *Titles of Honour*.

wall ; and many, of the royal family especially, were afterwards raised to the like honour. However, in the reign of queen Elizabeth, A. D. 1572, the whole order became utterly extinct ; but it was revived about fifty years afterwards by her successor, who was remarkably prodigal of honours, in the person of George Villiers, duke of Buckingham.

2. A marquess, *marchio*, is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom, which were called the marches, from the teutonic word *marche*, a limit ; such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons who had command there were called lords marchers, or marquesses, whose authority was abolished by statute 27 Hen. VIII. c. 27 ; though the title had long before been made a mere ensign of honour, Robert Vere, earl of Oxford, being created marquess of Dublin, by Richard II., in the eighth year of his reign.

3. An earl is a title of nobility so ancient that its original cannot clearly be traced out. Thus much seems tolerably certain : that among the Saxons they are called *ealdormen*, quasi eldersmen, signifying the same as senior or senator among the Romans ; and also *shiremen*, because they had each of them the civil government of a several division or shire. On the irruption of the Danes they changed the name to *eorles*, which, according to Camden, signified the same in their language. In Latin they are called *comites*, a title first used in the empire from being the king's attendants ; "*a societate nomen sumpserunt, reges enim tales sibi associant.*" After the Norman conquest they were for some time called *counts*, or *countees*, from the French ; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of earls, or *comites*, is now become a mere title, they having nothing to do with the government of the county ; which, as has been more than once observed, is devolved on the sheriff, the earl's deputy, or *vice-comes*. In writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him " trusty and well-beloved cousin : " an appellation as ancient as the reign of Henry IV., who

being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connection in all his letters and other public acts; from whence the usage has descended to his successors, though the reason has long ago failed.

4. The name of *vice-comes*, or viscount, was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by Henry the Sixth; when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of viscount Beaumont, which was the first instance of the kind.

5. A baron's is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles. But it hath sometimes happened that when an ancient baron hath been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently, one perhaps to the male descendants, the other to the heirs general, whereby the earldom or other superior title hath subsisted without a barony; and there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours: so that now the rule doth not hold universally, that all peers are barons. The origin and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court baron, which is the lord's court, and incident to every manor, gives some countenance. It may be collected from king John's *magna charta*, that originally all lords of manors, or barons, that held of the king *in capite*, had seats in the great council, or parliament; till about the reign of that prince the confux of them became so large and troublesome, that the king was obliged to divide them, and summon only the greater barons in person, leaving the small ones to be summoned by the sheriff, and, as it is said, to sit by representation in another house; which gave rise to the separation of the two houses of parliament. By degrees the title came to be confined to the greater barons, or lords of parliament only: and there were no other barons among the peerage but such as were summoned by writ, in

respect of the tenure of their lands or baronies, till Richard the Second first made it a mere title of honour, by conferring it on divers persons by his letters patent.

Having made this short inquiry into the original of our several degrees of nobility, I shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were, in right of those estates, allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign: and when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands; and thus, in 11 Hen. VI., the possession of the castle of Arundel was adjudged to confer an earldom on its possessor. But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to him or his ancestors was admitted as a sufficient evidence of the tenure.

Peers are now created either by writ or by patent; for those who claim by prescription must suppose either a writ or patent made to their ancestors, though by length of time it is lost. The creation by writ, or the king's letter, is a summons to attend the house of peers, by the style and title of that barony which the king is pleased to confer; that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby unless he actually take his seat in the house of lords, and some are of opinion that there must be at least two writs of summons and a sitting in two distinct parliaments to evidence an hereditary barony: and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it. Yet it is frequent to call up the eldest son of a peer to the house of lords by writ of summons, in the name of his father's barony; because in that case there is no danger of his chil-

dren's losing the nobility in case he never takes his seat ; for they will succeed to their grandfather. Creation by writ has also one advantage over that by patent ; for a person created by writ holds the dignity to him and his heirs, without any words to that purport in the writ ; but in letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life. For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs : as where a peerage is limited to a man, and the heirs male of his body by Elizabeth his present lady, and not to such heirs by any former or future wife. c

Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament and as hereditary counsellors of the crown ; both of which we have before considered. And first we must observe, that in criminal cases a nobleman shall be tried by his peers. The great are always obnoxious to popular envy ; were they to be judged by the people, they might be in danger from the prejudice of their judges, and would moreover be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by *magna carta*, c. 29. It is said that this does not extend to bishops, who, though they are lords of parliament, and sit there by virtue of their baronies which they hold *jure ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility. As to peeresses, there was no precedent for their trial when accused of treason or felony till after Eleanor duchess of Gloucester, wife to the lord protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9, which declares the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers : but if she be only noble by marriage, then by a second marriage with a commoner she loses her dignity ; for as by marriage it is gained, by marriage it is also lost. Yet if a duchess dowager marries a baron, she continues a duchess still ; for

all the nobility are *pares*, and therefore it is no degradation. A peer, or peeress, either in her own right or by marriage, cannot be arrested in civil cases; and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings.* A peer sitting in judgment gives not his verdict upon oath, like an ordinary jurymen, but upon his honour: he answers also to bills in chancery upon his honour, and not upon his oath; but when he is examined as a witness either in civil or criminal cases, he must be sworn: for the respect which the law shews, to the honour of a peer does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis*. The honour of peers is however so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm than of other men: scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers ancient statutes.

A peer cannot lose his nobility but by death or attainder; though there was an instance in the reign of Edward the Fourth of the degradation of George Nevile duke of Bedford, by act of parliament, on account of his poverty, which rendered him unable to support his dignity. But this is a singular instance; which serves at the same time, by having happened, to shew the power of parliament, and, by having happened but once, to shew how tender the parliament hath been in exerting so high a power. It hath been said, indeed, that if a baron waste his estate, so that he is not able to support the degree, the king may degrade him; but it is expressly held by later authority that a peer cannot be degraded but by act of parliament.

The commonalty, like the nobility, are divided into several degrees; and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility.

The first name of dignity next beneath a peer was anciently that of *vidames*, *vice-domini*, or *valvasors*: who are mentioned by our ancient lawyers as *virī magnæ dignitatis*; and sir Edward Coke speaks highly of them. Yet they are now quite out of use; and our legal antiquaries are not agreed upon even their original or ancient office.

Now, therefore, the first personal dignity, after the nobility, is a knight of the order of St. George, or of the garter, first instituted by Edward III., A.D. 1344. Next (but not till after certain official dignities, as privy councillors, the chancellors of the exchequer, and duchy of Lancaster, the chief justice of the king's bench, the master of the rolls, and the other English judges,) follows a knight banneret; who indeed by statutes 5 Ric. II. st. 2. c. 4. and 14 Ric. II. c. 14. is ranked next after barons; and his precedence before the younger sons of viscounts was confirmed to him by order of king James I. in the tenth year of his reign. But in order to entitle himself to this rank he must have been created by the king in person, in the field, under the royal banners, in time of open war. Else he ranks after baronets; who are the next in order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by king James the First, A.D. 1611, in order to raise a competent sum for the reduction of the province of Ulster in Ireland; for which reason all baronets have the arms of Ulster superadded to their family coat. Next follow knights of the bath; an order instituted by king Henry IV. and revived by king George the First. They are so called, from the ceremony of bathing the night before their creation. The last of these inferior nobility are knights bachelors: the most ancient, though the lowest order of knighthood amongst us; for we have an instance of king Alfred's conferring this order on his son Athelstan. The custom of the ancient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans; before this, they were not permitted to bear arms, but were accounted as a part of the father's household; after it, as part of the community. Hence some derive the usage of knighting, which has prevailed all over the western world, since its introduction by colonies from those northern heroes. Knights are called in Latin *equites aurati*: *aurati*, from the gilt spurs they wore; and *equites*, because they always served on horseback: for it is observable, that almost all nations call their knights by some appellation derived from a horse. They are also called in our law *milites*, because they formed a part of the royal army, in virtue of their feudal tenures; one condition of which was, that every one

who held a knight's fee immediately under the crown, which in Edward the Second's time amounted to 20*l.* per annum, was obliged to be knighted, and attend the king in his wars, or fine for his non-compliance. The exertion of this prerogative, as an expedient to raise money in the reign of Charles the First, gave great offence, though warranted by law, and the recent example of queen Elizabeth: but it was by the statute 16 Car. I. c. 16. abolished; and this kind of knighthood has, since that time, fallen into great disregard.

These, Sir Edward Coke says†, are all the names of dignity in this kingdom, esquires and gentlemen being only names of worship. But before these last the heralds rank all colonels, serjeants at law, and doctors in the three learned professions ‡.

Esquires and gentlemen are confounded together by Sir Edward Coke, who observes, that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears coat armour, the grant of which adds gentility to a man's family; in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real esquire; for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them. 1. The eldest sons of knights, and their eldest sons in perpetual succession. 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession; both which species of esquires Sir Henry Spelman entitles *armigeri natalitii*. 3. Esquires created by the king's letters patent, or other investiture; and their eldest sons. 4. Esquires by virtue of their offices; as justices of the peace, and others who bear any office of trust under the crown. To these may be added, the esquires of knights of the bath, each of whom constitutes three at his

†. 2 Inst. 667.

‡ The rules of precedence in England may be reduced to the following table: in which those marked * are entitled to the rank here allotted them, by stat. 31 Henry VIII. c. 10;—marked †, by statute 1 W. & M. c. 21:—marked ‡, by letters patent 9, 10, and 14 Jac. I. which see in Seld. Tit. of Hon. II. 5. 46. and II. 11. 3;—marked ‡, by ancient usage

installation : and all foreign, nay, Irish peers ; for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and

and established custom ; for which see, among others, Camden's *Britannia, tit. ordines* ; Milles's *Catalogue of Honour, edit. 1610*, and Chamberlayne's *Present State of England*, p. 3. ch. 3.

TABLE OF PRECEDENCE.

* The king's children and grand children.	* Barons.
* The king's brethren.	† Speaker of the house of commons.
* ———— uncles.	* Lords commissioners of the great seal.
* ———— nephews.	‡ Viscounts' eldest sons.
* Archbishop of Canterbury.	‡ Earls' younger sons.
* Lord chancellor or keeper, if a baron.	‡ Barons' eldest sons.
* Archbishop of York.	Knights of the garter.
* Lord treasurer,	Privy councillors.
* Lord president of the council,	Chancellor of the exchequer.
* Lord privy seal,	Chancellor of the duchy.
* Lord great chamberlain.	Chief justice of the king's bench.
(But see private stat. 1 Geo. I. c. 3.)	Master of the rolls.
* Lord high constable,	Chief justice of the common pleas.
* Lord marshal,	Chief baron of the exchequer.
* Lord admiral,	Judges, and barons of the coif.
* Lord steward of the household,	Knights bannerets, royal.
* Lord chamberlain of the household,	Viscounts' younger sons.
* Dukes.	Barons' younger sons.
* Marquesses.	Baronets.
† Dukes' eldest sons.	Knights bannerets.
* Earls.	† Knights of the bath.
† Marquesses' eldest sons.	† Knights bachelors.
† Dukes' younger sons.	Baronets' eldest sons.
* Viscounts.	Knights' eldest sons.
† Earls' eldest sons.	Baronets' younger sons.
† Marquesses' younger sons.	Knights' younger sons.
* Secretary of state, if a bishop.	† Colonels.
* Bishop of London.	† Serjeants at law.
* ———— Durham.	† Doctors.
* ———— Winchester.	† Esquires.
* Bishops.	† Gentlemen.
* Secretary of state, if a baron.	† Yeomen.
	† Tradesmen.
	† Artificers.
	† Labourers.

N.B. Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank is merely professional or official ;—and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers.

must be so named in all legal proceedings. As for gentlemen, says Sir Thomas Smith, they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. A yeoman is he that hath free land of forty shillings by the year; who was anciently thereby qualified to serve on juries, vote for knights of the shire, and do any other act, where the law requires one that is *probus et legalis homo*.

The rest of the commonalty are tradesmen, artificers, and labourers.

QUESTIONS.

Why is the king styled the *fountain of honour*?

What is the first title of rank, next to the royal family?

What is a marquess? An earl?

Who first created viscounts?

What is a baron?

How do the bishops come to sit in the house of lords?

What are the two methods of creating peers? Describe them.

By whom must a nobleman be tried? Why?

Is there any difference between the marriage of a peeress with a commoner, and with a peer but of rank inferior?

What does a peer speak *upon his honour*, and when must he be sworn?

What is *scandalum magnatum*?

How may a peer lose his nobility?

What is the order of dignity next to the peerage?

How is a baronet created?

What is a knight of the bath? Whence the name?

What are knights bachelors? Explain the term, *equites aurati*.

Who are esquires? What are the four classes of esquires named by Camden?

Who are gentlemen?

Who are yeomen?

THE MILITARY AND NAVAL ESTATES.

THE military state includes the whole of the soldiery ; or such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm.

In the time of our Saxon ancestors, as appears from Edward the confessor's laws, the military force of this kingdom was in the hands of the dukes or heretochs * who were constituted through every province and county in the kingdom ; being taken out of the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi.*" Their duty was to lead and regulate the English armies, with a very unlimited power ; "*prout eis visum fuerit, ad honorem coronæ et utilitatem regni.*" And because of this great power they were elected by the people in their full assembly, or folkmote, in the same manner as sheriffs were elected : following still that old fundamental maxim of the Saxon constitution, that where any officer was intrusted with such power, as if abused might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves.

This large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown ; and accordingly we find a very ill use made of it by Edric duke of Mercia, in the reign of king Edmund Ironside ; who, by his office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at last transferred the crown to Canute the Dane.

It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his do-

* From the Saxon *here* (exercitus) and *togen* (ducere)—the general of an army

minions soldiers : but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation ; though, from what was last observed, the dukes seem to have been left in possession of too large and independent a power : which enabled duke Harold, on the death of Edward the confessor, though a stranger to the royal blood, to mount, for a short space, the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir.

Upon the Norman conquest, the feudal law was introduced here in all its rigour, the whole of which is built on a military plan. I shall not now enter into the particulars of that constitution, but shall only observe, that, in consequence thereof, all the lands in the kingdom were divided into what were called knights' fees, in number above sixty thousand ; and for every knight's fee a knight, or soldier, *miles*, was bound to attend the king in his wars, for forty days in a year ; in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious. By this means, the king had, without any expense, an army of sixty thousand men always ready at his command.

This personal service, in process of time, degenerated into pecuniary commutations or aids, and at last the military part of the feudal system was abolished at the restoration, by statute 12 Car. II. c. 24.

In the mean time, we are not to imagine that the kingdom was left wholly without defence, in case of domestic insurrections, or the prospect of foreign invasions. Besides those, who by their military tenures were bound to perform forty days' service in the field ; first the assize of arms, enacted 27 Hen. II. and afterwards the statute of Winchester under Edward I., obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace ; and constables were appointed in all hundreds by the latter statute, to see that such arms were provided. These weapons were changed by the statute, 4 & 5 Ph. & M. c. 2. into others of more modern service : but, both this and the former provisions, were repealed in the reign of James I. While these continued in force, it was usual, from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide, to muster and

array, or set in military order, the inhabitants of every district; and the form of the commission of array was settled in parliament in the 5 Hen. IV., when it was also provided that no man should be compelled to go, out of the kingdom, at any rate, nor out of his shire, but in cases of urgent necessity; nor should provide soldiers, unless by consent of parliament. About the reign of king Henry VIII., or his children, lieutenants began to be introduced, as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the statute 4 & 5 Ph. & M. c. 3. though they had not been then long in use; for Camden speaks of them, in the time of queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger. But the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

In this state things continued, till the repeal of the statutes of armour in the reign of king James the First: after which, when king Charles the First had, during his northern expeditions, issued commissions of lieutenancy, and exerted some military powers, which, having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of militia did inherently reside in the king; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament: the two houses not only denying this prerogative of the crown, the legality of which might perhaps be somewhat doubtful; but also seizing into their own hands the entire power of the militia, of the illegality of which there could never be any doubt at all.

Soon after the restoration of king Charles the Second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination; and the order, in which the militia now stands by law, is principally built upon the statutes which were then enacted. It is true the two last of them are apparently repealed; but many of their provisions are re-

enacted, with the addition of some new regulations, by the present militia laws ; the general scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot for three years ; and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compellable to march out of their own counties, unless, in case of invasion, or actual rebellion within the realm or any of its dominions or territories, nor in any case compellable to march out of the kingdom. They are to be exercised at stated times : and their discipline, in general, is liberal and easy ; but, when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order.* This is the constitutional security which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence.

The petition of right enacts, that no soldier shall be quartered on the subject without his consent ; and that no commission shall issue to proceed within this land according to martial law. And whereas, after the restoration, king Charles the Second kept up above five thousand regular troops, by his own authority, for guards and garrisons ; which king James the Second by degrees increased to no less than thirty thousand, all paid from the civil list : it was made one of the articles of the bill of rights, that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

But as the fashion of keeping standing armies, which was first introduced by Charles VII. in France, A. D. 1445, has, of late years, universally prevailed over Europe : it has also, for many years past, been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, to maintain, even in time of peace, a standing body of troops, under the command of the crown ; who are, however, *ipso facto* disbanded at the expiration of every year, unless continued by parliament.

To keep this body of troops in order, an annual act of parliament likewise passes, " to punish mutiny and desertion, and for the better payment of the army and their quarters." This regulates the manner in which they are to

be dispersed among the several innkeepers and victuallers throughout the kingdom; and establishes a law martial for their government. By this, among other things, it is enacted, that if any officer or soldier shall excite, or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall desert or list in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands; such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself.

The royal navy of England hath ever been its greatest defence and ornament; it is its ancient and natural strength; the floating bulwark of the island; an army from which, however strong and powerful, no danger can ever be apprehended to liberty; and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground and substraction of all their marine constitutions, was confessedly compiled by our king Richard the First, at the isle of Oleron on the coast of France, then part of the possessions of the crown of England. And yet, so vastly inferior were our ancestors in this point to the present age, that, even in the maritime reign of queen Elizabeth, sir Edward Coke thinks it matter of boast that the royal navy of England then consisted of three-and-thirty ships. The present condition of our marine is in great measure owing to the salutary provisions of the statutes called the navigation acts; whereby the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary*.

The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles, and orders, first enacted by the

* The present Navigation Act is the stat. 3 & 4 W. 4. cap. 54. Its provisions, together with those of the Ship Registry Act, passed in the same session, will be found abridged and explained in *Smith's Compendium of Mercantile Law*, p. 87. There are two very recent Acts for the regulation and encouragement of seamen in the King's and Merchant Service, viz. 3 & 6 W. 4. cap. 19, and 5 & 6 W. 4. c. 24.

authority of parliament soon after the restoration, but since new modelled and altered, after the peace of Aix-la-Chapelle, to remedy some defects which were of fatal consequence in conducting the preceding war.

QUESTIONS.

In whose hands were the military forces of the kingdom in the time of the Saxons ?

Who were their officers, and how appointed ?

Who first settled a *national militia* in the kingdom ?

By what means was Harold enabled to usurp the throne in prejudice of Edgar Atheling ?

How did William the Conqueror secure an army of 60,000 men constantly at his command, without any expense ?

Was there any other method resorted to than this, to keep the peace ?

What were commissions of array ?

When were *lieutenants* introduced, and how ?

What was the great question that was the immediate cause of the fatal rupture between Charles I. and his parliament ?

How did the parliament act upon that occasion ?

How are the militia now constituted ?

What did the petition of right, and the bill of rights, enact concerning a standing army ?

When, and by whom, were the laws of *Oleron* framed ?

MASTER AND SERVANT.

THE three great relations in private life are, 1. That of *master and servant*; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife*; which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child*; which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated. But, since the parents, on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law hath therefore provided a fourth relation. 4. That of *guardian and ward*; which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural. Of all these relations in their order.

As to the several sorts of servants: I have formerly observed that pure and proper slavery does not, nay cannot, subsist in England; such, I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. Indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist anywhere. It is laid down that a slave or negro the instant he lands in England becomes a freeman; that is, the law will protect him in the enjoyment of his person and his property.

1. The first sort of servants, therefore, acknowledged by the laws of England, are menial servants; so called from being *intra mœnia*, or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general, without any particular time limited, the

law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term*.

2. Another species of servants are called apprentices, (from *apprendre*, to learn,) and are usually bound for a term of years, by a deed indented or indentures, to serve their masters, and be maintained or instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction: but it may be done to husbandmen, nay to gentlemen, and others. And children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting; who are also compellable to take them: and it is held, that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion; for which purposes, our statutes have made the indentures obligatory, even though such parish apprentice be a minor.

3. A third species of servants are labourers, who are only hired by the day or the week, and do not live *intra mania*, as part of the family.

4. There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as stewards, factors, and bailiffs: whom, however, the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property.

The master may maintain, that is, abet and assist his servant, in any action at law against a stranger: whereas, in general, it is an offence against public justice to encourage suits and animosities, by helping to bear the expense of them, and is called in law *maintenance*. A master also may bring an action against any man for beating or maiming his servant: but in such case he must assign, as a special reason for so doing, his own damage by the loss

* There is a peculiar rule relating to domestic servants which empowers the master to part with them on giving a month's warning or a month's wages. *Robinson v. Hindman*, 3 Esp. 235.

of his service; and this loss must be proved upon the trial. A master likewise may justify an assault in defence of his servant, and a servant in defence of his master: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. Also, if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them: but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand. The reason and foundation upon which all this doctrine is built, seems to be, the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se*. Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it; though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper's servants rob his guests, the master is bound to restitution: for, as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui non prohibet, cum prohibere possit, jubet*. So likewise, if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master: for, although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all, is, impliedly, a general command.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it,

I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish, when he comes by my order, and when upon his own authority.

If a servant, lastly, by his negligence, does any damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master. But in these cases the damage must be done while he is actually employed in the master's service: otherwise the servant shall answer for his own misbehaviour.

We may observe, that, in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself: and it is a standing maxim, that *no man shall be allowed to make any advantage of his own wrong.*

QUESTIONS.

What are the three great relations in private life?

Can pure and proper slavery exist in Great Britain?

Who are *menial* servants, and from what is the word "*menial*" derived?

Who are *apprentices*? Explain the derivation of the word.

Has a master any powers against third persons, in behalf of his servant? On what principle is this founded?

When is the master answerable for the acts of his servant?

Explain the application of the maxim "*No man shall be allowed to take advantage of his own wrong*," to the case of a master's liability for his servant's acts.

HUSBAND AND WIFE.

THE second private relation of persons is that of marriage, which includes the reciprocal rights and duties of husband and wife; or, as most of our elder law books call them, of *baron* and *feme*. In the consideration of which, I shall in the first place inquire, how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequence of marriage.

1. Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act *pro salute animæ*. And, taking it in a civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and lastly, actually did contract in the proper forms and solemnities required by law.

First, they must be willing to contract. "*Consensus facit nuptias*," is the maxim of the civil law in this case: and it is adopted by the common lawyers, who indeed have borrowed, especially in ancient times, almost all their notions of the legitimacy of marriage, from the canon and civil laws.

Secondly, they must be able to contract. In general, all persons are able to contract themselves in marriage, unless they labour under some particular disabilities and incapacities. What those are, it will be here our business to inquire.

Now these disabilities are of two sorts: first, such as

are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these, in our law, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation by blood; and affinity, or relation by marriage*; and some particular corporal infirmities.

By statute 32 Hen. VIII. c. 38, it is declared, that all persons may lawfully marry, but such as are prohibited by God's law. And, because, in times of popery, a great variety of degrees of kindred were made impediments to marriage, which impediments might, however, be bought off for money, it is declared by the same statute, that nothing, God's law excepted, shall impeach any marriage, but within the Levitical degrees; the furthest of which is that between uncle and niece.

The other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And, though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable; not that they dissolve a contract already formed, but they render the parties, incapable of performing any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction.

1. The first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void; polygamy being condemned both by the law of the New Testament, and the policy of all prudent states.

2. The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori*, therefore, it ought to avoid this, the most important con-

* The objections on the ground of consanguinity and affinity have ceased to be of merely ecclesiastical cognisance, for stat. 5 & 6 W. 4. c. 54, enacts, that marriages contracted after the passing thereof (31 August, 1835,) shall, if objectionable on either of those grounds, be absolutely void to all intents and purposes.

tract of any. Therefore, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree, and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law.

And, in our law, it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she may; for, in contracts, the obligation must be mutual; both must be bound, or neither; and so it is, *vice versa*, when the wife is of years of discretion, and the husband under.

4. Another incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract, be valid.

Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made *per verba de presenti*, or in words of the present tense, and in case of its being acted upon, *per verba de futuro* also, between persons able to contract, was before the late act* deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiæ*. But these verbal contracts are now of no force to compel a future marriage.

II. I am next to consider the manner in which marriages may be dissolved; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*. The total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before mentioned; and those, existing before the marriage, as is always the case in consanguinity; not supervenient, or arising afterwards. For, in cases of total

* Marriages have been regulated at various times, by stat. 26 G. 2. c. 33, 3 G. 4. c. 75, 4 G. 4. c. 76. and 6 & 7 W. 4. c. 85. The latter two are the acts now in force. They prescribe certain formalities previous to the solemnization of marriage; and inflict penalties for the non-observance of them; but do not annul the marriage, except in case of wilful non-observance by both parties.

divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*.

Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together, as in case of intolerable ill temper, or adultery in either of the parties. However, divorces *a vinculo matrimonii*, for adultery, have of late years been frequently granted by act of parliament.

III. Having thus shewn how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

By marriage, the husband and wife are *one person in law*: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, and protection, she performs every thing. *Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.* I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be to covenant with himself; and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. A woman, indeed, may be attorney for her husband; for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath any thing to his wife by will; for that cannot take effect till the married state is determined by his death. The husband is bound to provide his wife with necessaries by law, as much as himself: and if she contracts debts for them, he is obliged to pay for them; but, for any thing besides necessaries, he is not chargeable. Also, if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries; at least if the person who furnishes them is sufficiently apprised of her elopement. If the wife is indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her

person or her property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own; neither can she be sued, without making the husband a defendant. There is, indeed, one case, where the wife shall sue and be quod as a feme sole, viz. where the husband has abjured the realm, or is banished, for then he is *dead in law*; and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union. But, in trials of any sort, they are not allowed to be evidence for, or against, each other; partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet*;" and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*." But, where the offence is directly against the person of the wife, this rule has been usually dispensed with; and therefore, by statute 3 Hen. VII. c. 2, in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For, in this case, she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also, there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if, by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness to that very fact.

In the Civil law, the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and, therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband*.

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered, as inferior to him, and acting by

* So, too, in our Courts of Equity.

his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except in certain special cases, in which she must be solely and secretly examined, to learn if her act be voluntary. She cannot, by will, devise lands to her husband, unless under special circumstances; for, at the time of making it, she is supposed to be under his coercion. And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her: but this extends not to treason or murder.

The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable, in some cases, to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet*. The civil law gave the husband the same, or a larger authority over his wife: allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem*; for others, only *modicam castigationem adhibere*. But, with us, in the politer reign of Charles the Second, this power of correction began to be doubted: and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.

These are the chief legal effects of marriage, upon which we may observe, that even the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.

QUESTIONS.

What is the difference between the *temporal* and *ecclesiastical* law, with reference to marriage?

When will the *law* uphold a contract of marriage?

What was enacted concerning the degrees within which persons might marry, by statute 32 Henry VIII. c. 38?

What is the consequence of marrying, while a previous marriage is in force?

How many kinds of divorce are there?

What is the effect of marriage, in point of law?

Can husband and wife enter into any contract together after marriage? Why?

Can a man bequeath property to his wife?

By what acts may a wife bind her husband?

Are there any cases in which the wife, after the marriage, and in her husband's life-time, can be considered as a single woman? State them.

Can husband and wife be *evidence* for or against one another?

How are husband and wife regarded in the *civil* law—in the British Ecclesiastical Courts?

On what principles did the old law allow a husband to inflict on his wife personal chastisement? How is it now?

PARENT AND CHILD.

THE next and the most universal relation in nature is immediately derived from the preceding, being that between parent and child.

Children are of two sorts; legitimate, and illegitimate: each of which we shall consider in their order; and, first, of legitimate children.

I. A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. "*Pater est quem nuptiæ demonstrant*," is the rule of the civil law; and this holds with the civilians, whether the nuptials happen before or after the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth. At present let us inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

1. And, first, the duties of parents to legitimate children: which principally consist in three particulars: their maintenance, their protection, and their education.

The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish.

It is a principle of our own law, that there is an obligation on every man to provide for those descended from him; and the manner in which this obligation shall be performed is thus pointed out. The father and mother, grandfather and grandmother, of poor impotent persons, shall maintain them at their own charges, if of sufficient ability.

No person is bound to provide a maintenance for his

issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent, against his will, to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours.

Our law has made no provision to prevent the disinheriting of children by will*: leaving every man's property in his own disposal, upon a principle of liberty, in this, as well as every other, action: though perhaps it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs also, and children, are favourites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir. •

From the duty of maintenance, we may easily pass to that of protection, which is also a natural duty, but rather permitted than enjoyed by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their law-suits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defence of the persons of his children.

The last duty of parents to their children is that of giving them an education suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes, it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him

* • The civil law would not allow a parent to disinherit his child without giving a valid reason for doing so: and if he gave a bad one, or a false one, the child might set the will aside.

into the world, if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences, which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children: and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family.

2. The power of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompence for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents, than those of others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away. But the rigour of these laws was softened by subsequent constitutions; so that we find a father banished by the emperor Hadrian for killing his son, though he had committed a very heinous crime, upon this maxim, that "*patria potestas in pietate debet, non in atrocitate, consistere.*" But still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life.

The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under

age, in a reasonable manner; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age, is also directed by our law to be obtained.

The legal power of a father over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established, (as some must necessarily be established,) when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child: who is then *in loco parentis**, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

3. The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws.

The law does not hold the tie of nature to be dissolved by any misbehaviour of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the cause or suit, of a bad parent, as a good one; and is equally compellable, if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shewn the greatest tenderness and parental piety.

II. We are next to consider the case of illegitimate children. Such by our English laws, is one that is born

* See this beautifully expressed by Juvenal.

"Dii! majorum umbris, tenuem et sine pondere terram,

"Spirantesque crocos, et in unâ perpetuum ver,

"Qui præceptorem sancti voluere parentis

"Esse loco!"

out of lawful matrimony. The civil and canon laws do not allow a child to remain illegitimate, if the parents afterwards intermarry: and herein they differ most materially from our law; which makes it an indispensable condition, to make it legitimate, that it shall be born after lawful wedlock.

3. His rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody; and sometimes called *filius nullius*, sometimes *filius populi*. Yet he may gain a surname by reputation, though he has none by inheritance. He was also, in strictness, incapable of holy orders; and though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church; but this doctrine seems now obsolete; and in all other respects there is no distinction between him and another man. And really any other distinction but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree; and yet the civil law, so boasted of for its equitable decisions, made such children in some cases incapable even of a gift from their parents. An illegitimate may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise: as was done in the case of John of Gant's children, by a statute of Richard the second.

QUESTIONS.

What is a *legitimate* child?

Does our law require a parent to support his child.

How is this rule limited?

May a parent totally disinherit all his children, if he will?

May a parent uphold his children in law-suits? May he justify an assault and battery in defence of his children?

Do our laws compel a parent to educate his children?

What was the ancient Roman law with reference to a parent's power over his children?

What are our laws on this subject?

Where does a parent's power over his children cease?

Does a tutor or schoolmaster stand *in loco parentis*?

Has he the power of restraint and correction?

GUARDIAN AND WARD.

THE only general private relation now remaining to be discussed, is that of guardian and ward; which bears a very near resemblance to the last, and is plainly derived out of it: the guardian being only a temporary parent, that is, for so long time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardianships, how they are appointed, and their power and duty: next, the different ages of persons, as defined by the law: and lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

Of the several species of guardians, the first are *Guardians by nature*: viz. the father, and, in some cases, the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. And, with regard to daughters, it seems by construction of the statute 4 & 5 Ph. & Mar. c. 8. that the father might by deed or will assign a guardian to any woman-child under the age of sixteen; and if none be so assigned, the mother shall in this case be guardian. There are also *guardians for nurture*; which are, of course, the father or mother, till the infant attain the age of fourteen years. Next are *guardians in socage*, an appellation which will be explained in another part of these commentaries, who are also called guardians by the common law. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend*; as where the estate

* Since stat. 3 & 4 W. 4, c. 106, there is no kinsman who cannot inherit, Guardianship in socage seems therefore to be now *legally*, as it was long ago *virtually*, obsolete.

descended from his father, in this case, his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian. For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust. The Roman laws proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate to which he has a prospect of succeeding: and this they boast to be "*summa providentia*." But, in the mean time, they seem to have forgotten, how much it is the guardian's interest to remove the incumbrance of his pupil's life from that estate for which he is supposed to have so great a regard. And this affords Fortescue, and Sir Edward Coke, an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is next in succession, is "*quasi agnum committere lupo, ad devorandum*." These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship in chivalry (which lasted till the age of twenty-one, and of which we shall speak hereafter), enacts that any father, under age, or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person except a popish recusant, either in possession or reversion, till such child attains the age of one-and-twenty years. These are called guardians by statute, or testamentary guardians. There are also special guardians, by custom of London, and other places; but they are particular exceptions, and do not fall under the general law.

The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child; and therefore I shall not repeat them: but shall only add, that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default

or negligence. In order, therefore, to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case therefore any guardian abuses his trust, the court will check and punish him; nay, sometimes will proceed to the removal of him, and appoint another in his stead.

2. Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is that is said to be within age. The ages of male and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor; and at twenty-one is at his own disposal, and may aliene his lands, goods, and chattels. A female also at seven years of age may be betrothed, or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage; and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands. So that full age in male or female is, twenty-one years, which age is completed on the day preceding the anniversary of a person's birth; who till that time is an infant, and so styled in law.

3. Infants have various privileges, and various disabilities: but their disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks, as well by the law as otherwise: but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein*

amj may be any person who will undertake the infant's cause; and it frequently happens that an infant, by his *prochein amj*, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant of the age of fourteen years may be capitally punished for any capital offence; but under the age of seven he cannot. The period between seven and fourteen is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion. And sir Matthew Hale gives us two instances, one, of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companions and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil: and in such cases the maxim of law is, that *malitia supplet etatem*. So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges.

With regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters; but this may be said in general, that an infant shall lose nothing by non-claim or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases.

It is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions: part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot aliene their estates; but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, estates they hold in trust or mortgage, to such persons the court shall appoint. Also, it is generally true, that an infant can do no legal act; yet, an infant, who has an

advowson, may present to the benefice when it becomes void. For the law in this case dispenses with one rule, in order to maintain others of far greater consequence: it permits an infant to present a clerk, who, if unfit, may be rejected by the bishop, rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may also purchase lands, but his purchase is incomplete: for when he comes to age he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement. It is, farther, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable; yet in some cases he may bind himself apprentice by deed indented or indentures, for seven years; and he may, by deed or will, appoint a guardian to his children, if he has any. Lastly, it is generally true, that an infant can make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessities; and likewise for his good teaching and instruction, whereby he may profit himself afterwards. And thus much, at present, for the privileges and disabilities of infants.

QUESTIONS.

Who is a guardian by nature?—A guardian for nurture?—A guardian in socage?

When does this last take place? Is there any difference between our laws and those of ancient Rome, on this subject?

What is a testamentary guardian?

Who is the supreme guardian of all Infants, Idiots, and Lunatics?

What is a male infant allowed to do at twelve years of age—at fourteen—at seventeen? What is a female infant allowed to do at seven—nine—twelve—fourteen—seventeen?

When is full age completed?

What is the *Prochein Amy* of an infant—and what are his duties?

What is the earliest age at which an infant may be capitally punished?

State some of the leading disabilities of Infants.

CORPORATIONS.

WE have hitherto considered persons in their *natural capacities*, and have treated of their rights and duties. But, as all personal rights die with the person ; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable ; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute *artificial persons*, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

These artificial persons are called 'bodies politic,' 'bodies corporate' (*corpora corporata*), or 'CORPORATIONS : ' of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce : in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To shew the advantages of these incorporations, let us consider the case of a college, in either of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so : but they could neither frame, nor receive, any laws or rules of their conduct : none, at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities ; for, if such privileges be attacked, which of all this unconnected assembly has the right or ability to defend them ?—and, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves ; so also

with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But, when they are consolidated and united into a *corporation*, they and their successors are then considered as ONE PERSON in law ; as one person they have *one will*, which is collected from the sense of the majority of the individuals : this *one will* may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic ; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws : the privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successors ; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies : in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honour of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa ; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law, in which they were called *universitates*, as forming one whole out of many individuals ; or *collegia*, from being gathered together : they were adopted also by the canon law, for the maintenance of ecclesiastical discipline ; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation ; particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion, their maxim being that “ *tres faciunt collegium*.” Though they held, that if a corporation originally consisting of three persons be reduced to one, “ *si*

universitas ad unum redit," it may still subsist as a corporation, "*et stet nomen universitatis*."

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

The first divisions of corporations is into aggregate and sole. *Corporations aggregate* consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever: of which kind are the mayor and commonalty of a city, the heads and fellows of a college, the dean and chapter of a cathedral church. *Corporations sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation: so is a bishop: so are some deans, and prebendaries, distinct from their several chapters: and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the original endowment of parish churches, the freehold of the church, the church-yard, the parsonage-house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompence to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompence for the same care. But how was this to be effected? The freehold was vested in the parson; and if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the king: by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and

what was given to the one was given to the other also.

Another division of incorporations, either sole or aggregate, is into ecclesiastical and lay. *Ecclesiastical corporations* are where the members that compose them are entirely spiritual persons; such as bishops; certain deans and prebendaries; all archdeacons, parsons, and vicars; which are sole corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like bodies aggregate. These are elected for the furtherance of religion, and perpetuating the rights of the church. *Lay Corporations* are of two sorts, *civil* and *eleemosynary*. The *civil* are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possessions of the crown entire; for immediately upon the demise of one king, his successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district*; some for the advancement and regulation of manufactures and commerce; as the trading companies of London and other towns; and some for the better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish; the college of physicians and company of surgeons in London, for the improvement of the medical science; the royal society, for the advancement of natural knowledge; and the society of antiquaries, for promoting the study of antiquities. And among these I am inclined to think the general corporate bodies of the universities of Oxford and Cambridge must be ranked; for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy: neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries; for these are rewards *pro opera et labore*, not charitable donations only, since every stipend is preceded by service and duty: they seem therefore to be merely civil corporations.

* These are now regulated by stat. 5 & 6 W. 4, c. 76. commonly called the MUNICIPAL CORPORATION ACT.

The *eleemosynary* sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them, to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent: and all colleges, both in our universities and out of them: which colleges are founded for two purposes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies.

Having thus marshalled the several species of corporations, let us next proceed to consider, 1. How corporations, in general, may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And, 4. How they may be dissolved.

Corporations, by the civil law, seem to have been created by the mere act and voluntary association of their members; provided such convention was not contrary to law. for then it was *illicitum collegium*. It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies, for they were little more than such, should not establish any meetings in opposition to the laws of the state.

But, with us in England, the king's consent, either impliedly or expressly given; is absolutely necessary to the erection of any corporation. The king's implied consent is to be found in corporations which exist by force of the common law, to which our former kings are supposed to have given their concurrence; common law being nothing else but custom, arising from the universal agreement of the whole community. Of this sort are the king himself, all bishops, parsons, vicars, churchwardens, and some others; who, by common law, have ever been held, as far as our books can show us, to have been corporations *virtute officii*: and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation

capable to transmit his rights to his successors at the same time. Another method of implication, whereby the king's consent is presumed, is, as to all corporations by prescription, such as the city of London, and many others, which have existed as corporations, time whereof the memory of man runneth not to the contrary, and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one; and that, by the variety of accidents, which a length of time may produce, the charter is lost or destroyed. The methods by which the king's consent is expressly given, are either by act of parliament or charter.

When a corporation is erected, a NAME must be given to it; and by that name alone it must sue and be sued, and do all acts; though a very minute variation therein is not material. *Such name is the very being of its constitution*, and, though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions.

After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course. As, 1. To have perpetual succession. This is the very end of its incorporation: for there cannot be a succession for ever without an incorporation; and therefore all aggregate corporations have a power necessarily implied of electing members, in the room of such as go off. 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors; which two are consequential to the former. 4. To have a common seal. For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent

of the whole*. To make bye-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation: for, as natural reason is given to the natural body for the governing it, so bye-laws or statutes are a sort of political reason to govern the body politic.

These five powers are inseparably incident to every corporation, at least to every corporation aggregate: for two of them, though they may be practised, yet are very unnecessary to a corporation sole, viz. to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney; for it cannot appear in person, being, as sir Edward Coke says, invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries: for a corporation can neither beat nor be beaten, in its body politic. A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities. Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seised of lands to the use of another; for such kind of confidence is foreign to the end of its institution. Neither can it be committed to prison: for its existence being ideal, no man can apprehend or arrest it. And therefore also it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do. Neither can a corporation be excommunicated: for it has no soul, as is gravely observed by sir Edward Coke: and therefore also it

* Trading corporations, in order to enable them more fully to accomplish the purpose for which they are created, are enabled to do certain acts without the affixing of their common seal.—See these enumerated in *Smith's Mercantile Law*, b. i. c. 2.

is not liable to be summoned in the ecclesiastical courts upon any account; for those courts act only *pro salute animæ*, and their sentences can only be enforced by spiritual censures: a consideration, which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

There are also other incidents and powers, which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot: for such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corporations merely lay, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own bye-laws, not contrary to the laws of the realm. Aggregate corporations also, that have by their constitution a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head. But there may be a corporation aggregate constituted without a head: as the collegiate church of Southwell in Nottinghamshire, which consists only of prebendaries; and the governors of the Charter-house, London, who have no president or superior, but are all of equal authority. In aggregate corporations also, the act of the major part is esteemed the act of the whole. By the civil law this major part must have consisted of two-thirds of the whole; else no act could be performed: which perhaps may be one reason why they required three at least to make a corporation. But, with us, any majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act; which king Henry VIII. found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations, it was therefore enacted by statute

43 Hen. VIII. c. 27, that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this statute extends not to any negative or necessary voice, given by the founder to the head of any such society.

We before observed, that it was incident to every corporation, to have a capacity to purchase lands for themselves and successors: and this is regularly true at the common law. But they are excepted out of the statute of wills: so that no devise of lands to a corporation by will is good: except for charitable uses, by statute 43 Eliz. c. 4.: which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also, by a great variety of statutes, their privilege even of purchasing from any living grantor is much abridged: so that now a corporation, either ecclesiastical or lay, must have a licence from the king to purchase, before they can exert that capacity which is vested in them by the common law; nor is even this in all cases sufficient. These statutes are generally called the statutes of *mortmain*: all purchases made by corporate bodies being said to be purchases in *mortmain*, in *mortua manu*: for the reason of which appellation sir Edward Coke offers many conjectures; but there is one which seems more probable than any that he has given to us: viz. that these purchases being usually made by ecclesiastical bodies, the members of which, being professed, were reckoned dead persons in law, land therefore, holden by them, might with great propriety be said to be held in *mortua manu*.

The general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one: that of acting up to the end or design, whatever it be, for which they were created by their founder.

I proceed next to inquire how these corporations may be visited. For corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And, for that reason, the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesias-

tical corporations, the Ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are, in ecclesiastical matters, the visitors of all deans and chapters, of all parsons and vicars, and all other spiritual corporations. With respect to all lay corporations; the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for, in a lay incorporation, the ordinary neither can nor ought to visit.

I know it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land; and this shall be presently explained. But first, as I have laid it down as a rule, that the founder, his heirs, or assigns, are visitors of all lay corporations, let us inquire what is meant by the founder. The founder of all corporations, in the strictest and original sense, is the king alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two species of foundation, the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is, in law, the founder: and it is in this last sense that we generally call a man the founder of a college or hospital. But here the king has his prerogative; for, if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it. And, in general, the king being the sole founder of all civil corporations, and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king; and of the latter, to the patron or endower.

The king being thus constituted by the law visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction, which is the

court of king's bench; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers, when they say that these civil corporations are liable to no visitation; that is, that the law, having by immemorial usage appointed them to be visited and inspected by the king their founder, in his majesty's court of king's bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority. And this is so strictly true, that though the king, by his letters patent, had subjected the college of physicians to the visitation of four very respectable persons, the lord chancellor, the two chief justices, and the chief baron; though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for near a century; yet, in 1753, the authority of this provision coming in dispute, on an appeal preferred to these supposed visitors, they directed the legality of their own appointment to be argued: and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days' solemn debate, that they had no jurisdiction as visitors; and remitted the appellant, if aggrieved, to his regular remedy in his majesty's court of king's bench.

As to eleemosynary corporations; by the dotation the founder and his heirs are, of common right, the legal visitors, to see that such property is rightly employed as might otherwise have descended to the visitor himself; but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of his heir.

We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land; or he may resign it by his own voluntary act. But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person or his heirs who granted them to the corporation: for the law doth annex a condition to every such grant, that if the corporation be dissolved the grantor shall have the lands again, because the cause of the grant faileth. The

grant is indeed only during the life of the corporation, which may endure for ever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities, agreeable to that maxim of the civil law, "*si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*"

A corporation may be dissolved, 1. By act of parliament, which is boundless in its operations. 2. By the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the state, in the reigns of king Charles and king James the second, particularly by seizing the charter of the city of London, gave great and just offence, though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reversed by act of parliament after the revolution, and, by the same statute, it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatsoever.

QUESTIONS.

On what grounds has the law created what are called "*artificial persons*?"

Illustrate this doctrine by the case of a College.

Justify Blackstone's Comparison of a Corporation to the river Thames.

Who originally invented these institutions?

What is the distinction between a Corporation aggregate and a Corporation sole?

Which of these kinds is the King?—A Bishop?—A Parson?

Explain this doctrine in the instance of the Parson.

What is an Ecclesiastical Corporation?

How many kinds of Civil Corporations are there?

Why is the King made a Corporation?

What is an Eleemosynary Corporation?

Whose consent is essential to the creation of a Corporation?

How is the King's *implied* consent evidenced?

How is his *express* consent obtained?

Is the *Name* of a Corporation a matter of any importance?

What are the five powers inseparably incident to every Corporation aggregate?

Which of these are inapplicable to a Corporation sole?

Why must a Corporation aggregate appear by attorney?

State some of the leading Disabilities of Corporations.

What are the Statutes of *Mortmain*? Explain the derivation of the last word.

How are Corporations regulated?

Who is the Visitor of all Civil Corporations?

Where is this his Jurisdiction exercised?

Who is the Visitor of Eleemosynary Corporations?

In how many ways may a Corporation be dissolved?

THE ORIGIN AND GROWTH OF PROPERTY.

THERE is nothing which so generally strikes the imagination, and engages the affections of mankind, as *the right of property* ; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the *origin* and *foundation* of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title ; or, at best, we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner ; not caring to reflect that, accurately and strictly speaking, there is no foundation in *nature* or in *natural* law, why a set of words upon parchment should convey the dominion of land ; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him ; or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered, not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." *This is the only true and solid foundation of man's dominion over external things*, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of these times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset.*" Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the substance of the thing; nor could it be extended to the use of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, without injustice. Thus also a vine, or

other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own.

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals, not the immediate use only, but the very substance of the thing to be used. Otherwise, ifnumerable tumults must have arisen, and the good order of the world have been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of *habitations* in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence, a property was soon established in every man's house, and home-stall; which seem to have been originally mere temporary huts or moveable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of long occupancy, which might be continued for months

together without any sensible interruption, and at length by usage ripen into an established right; but principally, because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant; which bodily labour, bestowed upon any subject which before lay in common to all men, is universally acknowledged to give the fairest and most reasonable title to the exclusive property therein.

The article of *food* was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of water also a very important point. And therefore, the book of Genesis, the most venerable monument of antiquity considered merely with a view to history, will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage yet remained in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "*because he had digged that well.*" And Isaac, about ninety years afterwards, reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace.

All this while, the soil and pasture of the earth remained still in common as before, and open to every occupant: except, perhaps, in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands for the sake of agriculture, was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the

wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the East ; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages ; and which, Tacitus informs us, continued among the Germans till the decline of the Roman empire. We have also a striking example of the same kind in the history of Abraham and his nephew Lot. When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants ; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose : " Let there be no strife, I pray thee, between thee and me. Is not the whole land before thee ? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right ; or if thou depart to the right hand, then I will go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. " And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered every where, even as the garden of the Lord. Then Lot chose him all the plain of Jordan, and journeyed east ; and Abraham dwelt in the land of Canaan."

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants ; which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour : how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered, by those, who have rendered their names immortal by thus civilising mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit,

without encroaching upon former occupants: and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or, at least, promoted and encouraged, the art of agriculture. And the art of *agriculture*, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would *not* produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour? Had not, therefore, a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now, so graciously has Providence interwoven our duty and happiness together, the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its rational faculties, as well as of exerting its natural. Necessity beget property, and, in order to ensure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, governments, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, *how this property became actually VESTED*: or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to every body, but particularly to nobody. And, as we before observed, that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands that OCCUPANCY gave also the original right to the permanent property in the substance of the earth itself; which excludes every one

else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting, that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

Property, both in land and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So, if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he loses it or drops it by accident, it cannot be collected from thence, that he designed to quit the possession: and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to *treasure trove*.

But this method of one man's abandoning his property, and another seizing the vacant possession, however well founded in theory, could not long subsist in fact. It was

calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent that was equally desirable to the former proprietor. Thus, mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance; which may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus, the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

The most universal and effectual way of abandoning property, is by the *death of the occupant*; when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society; for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But, as under civilised governments which are calculated for the peace of mankind, such

a constitution would be productive of endless disturbances, the universal law of almost every nation, which is a kind of secondary law of nature, has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir, of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion, which its becoming again vacant would occasion. And further, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of *escheats* is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be found.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive, at first view, that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil, right. It is true, that transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society; it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose, not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till, at

length, in process of time this frequent usage ripened into general law. And therefore also, in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs, being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring, that, "since God had given him no seed, his steward Eliezer, one born in his house, was his heir."

While property continued only for life, testaments were useless and unknown; and, when it became inheritable, the inheritance was long indefeasible, and the children, or heirs at law, were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigencies of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by testament (that is, by written or oral instructions, properly witnessed and authenticated,) according to the pleasure of the deceased, which we therefore emphatically style his will. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth; and then only of a certain portion; for it was not till after the Restoration that the power of devising real property became so universal as at present.

Wills, therefore, and testaments, rights of inheritance, and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid; neither does any thing vary more than the right of inheritance under different national establishments. In England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws, in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. Thus, in general, only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance; in real estates, males are preferred to females, and

the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice; while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only two witnesses instead of three, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles; as if, on the one hand, the son had *by nature* a right to succeed to his father's lands; or, as if, on the other hand, the owner was *by nature* entitled to direct the succession of his property after his own decease. Whereas *the law of nature* suggests, that on the death of the possessor, the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. *The positive law of society*, which is, with us, the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person, who, from the result of certain local constitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed: and, where the necessary requisites are omitted, the right of the heir is equally strong, and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

But after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such, among others, are the elements of light, air, and water; which a man may occupy by means of

his *windows*, his *gardens*, his *mills*, and other conveniences, such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition: which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again; there are other things, in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of *game*. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by expressly designating those to whom such things are to belong. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

QUESTIONS.

What is the only true and solid foundation of man's dominion over external things?

How did Cicero illustrate the early state of the world with regard to the origin of property, in particular parts of the earth?

What was the earliest subject of exclusive property?

On what ground did Abraham claim a well in the country of Abimelech?

What led to the dispute between Abraham and Lot—and how does it illustrate the history of the growth of property?

On what principle is founded the right of *emigration* ?

What led to the invention of agriculture ?

What was it that gave the original right to the permanent property in the substance of the earth itself ?

What led to *traffic*—and the reciprocal transfer of property ?

What effect had *death*, in early times, on the right of property ?

What is meant by *escheats* ?

Which was first allowed—the right of inheritance, or of willing away property ?

What led to the right of disposing of property by will ?

When was the willing away of lands first permitted in this country ?

On what grounds is a father justified in disinheriting his son, and giving his property to a stranger ?

What kind of right has a man in the light, air, water, &c ? •

REAL AND PERSONAL PROPERTY.

THE objects of dominion or property are *things*, as contradistinguished from persons: and things are by the law of England distributed into two kinds; things real, and things personal. *Things* REAL are such as are *permanent, fixed, and immoveable*, which cannot be carried out of their place: as lands and tenements:—*things* PERSONAL are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go.

Real property consists in lands, tenements, or hereditaments. "*Land*" comprehends all things of a permanent substantial nature; being a word of a very extensive signification. "*Tenement*" is a word of still greater extent; and though, in its vulgar acceptation, it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies every thing that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. An *hereditament*, says sir Edward Coke, is, by much the largest and most comprehensive expression: for it includes, not only lands and tenements, but *whatsoever may be inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus an heir-loom or implement of furniture, which, by custom, descends to the heir together with a house, is neither land, nor tenement, but a mere moveable: yet, being inheritable, is comprised under the general word hereditament.

Hereditaments, to use the largest expression, are of two kinds, *corporeal* and *incorporeal*. Corporeal consist of such as affect the senses; such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial

and permanent objects—all which may be included under the general denomination of *land* only.

An incorporeal hereditament is *a right issuing out of a thing corporate*, whether real or personal, or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office, relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the *substance*, which may be always seen, always handled; incorporeal hereditaments are but a sort of *accidents*, which adhere to and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely *in idea and abstracted contemplation*; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So, tithes, if we consider the produce of them, as the tenth sheaf, or the tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments; for they, being merely a contingent springing right, collateral to, or issuing out of lands, can never be the object of sense: that casual share of the annual increase is not, till severed, capable of being shown to the eye, nor of being delivered into bodily possession.

QUESTIONS.

What are the two species of property?

Explain the significations of the words "lands," "tenements," and "hereditaments."

What is the distinction between the two kinds of hereditaments?

How would a logician describe them?

THE FEUDAL SYSTEM.

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law: a system so universally received throughout Europe upwards of twelve centuries ago, that sir Henry Spelman does not scruple to call it the law of nations in our western world. This chapter will therefore be dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientific manner, without having recourse to the ancient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour.

The constitution of feuds had its origin from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium*, as Craig very justly entitles it, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions; and to that

end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called *feoda*, feuds, fiefs, or fees; which last appellation in the northern languages signifies a conditional stipend or reward. Rewards or stipends they evidently were: and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.

Allotments, thus acquired, naturally engaged such as accepted them to defend them: and, as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or general himself; and the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly-acquired country: the produce of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe; that is, of those countries which

had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them, thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial*, that is, wholly independent, and held of no superior at all; now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military fealty. And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto so universally obtained, but now became for many centuries lost and forgotten; and Italy itself, as some of the civilians, with more spleen than judgment, have expressed it, *belluinas, atque ferinas, immanesque Longobardorum leges accepit*.

But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman. Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the time of the Saxons, who were a swarm from what sir William Temple calls the same northern hive, something similar to this was in use; yet not so extensively, nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe.

This introduction, however, of the feudal tenures into England, by King William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the conqueror, and afterwards universally consented to by the great council of the nation long after his title

was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having, by right of the sword, seized on all the lands of England, and dealt them out again to his own favourites. A supposition grounded upon a mistaken sense of the word *conquest*; which, in its feudal acceptation, signifies no more than *acquisition*; and this has led many hasty writers into a strange historical mistake, and one which, upon the slightest examination, will be found to be most untrue. However, certain it is, that the Normans now began to gain very large possessions in England; and their regard for the feudal law under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle, that in the nineteenth year of king William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless; which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For as soon as the danger was over, the king held a great council to inquire into the state of the nation; the immediate consequence of which was the compiling of the great survey called the *Doomsday-book*, which was finished in the next year: and in the latter end of that very year, the king was attended by all his nobility at Sarum; where all

the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person.

This new polity, therefore, seems not to have been imposed by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king; and thus, by degrees, all the allodial estates in France were converted into feuds, and the freemen became the vassals of the crown. The only difference between this change of tenures in France and that in England was, that the former was effected gradually by the consent of private persons; the latter was done at once, all over England, by the common consent of the nation.

In consequence of this change, it became a fundamental maxim and necessary principle, though in reality a mere fiction, of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom, and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services." For this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substraction and foundation of their new polity, though the fact was indeed far otherwise. And indeed, by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves, in respect of their lands, to maintain the king's title and territories, with equal vigour and fidelity, as if they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding; and thereupon

took a handle to introduce, not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations; as if the English had, in fact as well as theory, owed every thing they had to the bounty of their sovereign lord.

Our ancestors, therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions and arbitrary conclusions from principles that, as to them, had no foundation in truth. • However, this king, and his son William Rufus, kept up with a high hand all the rigours of the feudal doctrines: but their successor, Henry I., found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the Confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter, whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till in the reign of king John they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him; which at length produced the famous great charter of Runing-mead, which, with some alterations, was confirmed by his son Henry III. And, though its immunities, especially as altered on its last edition by his son, are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the further alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted; but this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not, as some arbitrary writers would represent them, mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution of which our ancestors had been

defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

The grand and fundamental maxim of all feudal tenure is this; that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or lord, being he who retained the dominion or ultimate property of the feud or fee; and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or vassal, which was only another name for the tenant or holder of the lands; though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards grafted on this system, we now use the word vassal opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi*; which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the æra of the new acquisition, at a time when the art of writing was very little known; and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of fealty, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture did usually homage to his lord, openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him, and there professing that "he did become his man, from that day forth, of life and limb and earthly honour;" and then he received a kiss from his lord. Which ceremony was denominated *homagium*, or manhood, by the feudists, from the stated form of words, *devenio vester homo*.

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, ~~recompence~~ for the land that he held. This, in pure

proper, and original feuds, was only twofold; to follow, or do suit to, the lord in his courts in time of peace, and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories; and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts baron, which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants; in order, as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants; and, upon this account, in all the feudal institutions both here and on the continent, they are distinguished by the appellation of the peers of the court, *pares curtis*, or *pares curiæ*. In like manner, the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him, upon summons, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves, in almost every feudal government, the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the will of the lord, who was then the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more years. Among the ancient Germans they continued only from year to year, an annual distribution of lands being made by their leaders in their general councils or assemblies. This was professedly done, lest their thoughts should be diverted from war to agriculture; lest the strong should encroach upon the possessions of the weak; and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and peaceable possession of the new acquired settlements had introduced new customs and manners; when the fertility of

the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the life of the feudatory. But still feuds were not yet hereditary, though frequently granted, by the favour of the lord, to the children of the former possessor, till in process of time it became unusual, and was therefore thought hard, to reject the heir if he were capable to perform the services. and therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it raised up and re-established the inheritance, or, in the words of the feudal writers, "*incertam et caducam hereditatem relevabat.*" This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

For, in process of time, feuds came by degrees to be universally extended beyond the life of the first vassal to his sons, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed; for if a feud was given to a man and his sons, all his sons succeeded him in equal portions: and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation. But when such a feud was given to a man and his heirs, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others, for this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory." And the descent, being thus confined to males, originally extended to all males alike; all the sons, without any distinction of prim

geniture, succeeding to equal portions of the father's fœud. But this being found upon many accounts inconvenient, particularly by dividing the services, and thereby weakening the strength of the feudal union, and honorary feuds, or titles of nobility, being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son; in imitation of these, military feuds, or those we are now describing, began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.

Other qualities of feuds were, that the feudatory could not alienate or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord. For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or from his posterity, who were presumed to inherit his valour, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service; therefore the lord could no more transfer his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord: it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

These were the principal, and very simple qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military persons; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents. And by these means the feudal polity was greatly extended; these inferior feudatories, who held what are called in the Scots law "re-re-fiefs," being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords. But this at the same time demolished the ancient simplicity of feuds:

and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession: which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprised all such as do not fall within the other descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual licence; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud.

But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which the most refined and oppressive consequences were drawn from what was originally a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England may be gathered from the following pages.

QUESTIONS.

With whom did the feudal system originate?

Explain the word "*feoda*"—(feuds or fees.)

What was the *oath of fealty*?

What effect was produced upon the princes of Europe, by

observing the wisdom of the feudal system introduced by the northern nations?

What system of laws in Europe were superseded by the feudal laws?

Who introduced this system formally and nationally into England?

Were feuds known here before the reign of this king?

Were feuds suddenly or gradually introduced?

What was Domesday Book, and when and why compiled?

What was the difference between the introduction of feuds into England and France?

What was the fundamental maxim of our English tenures, after the introduction of feuds?

Were the incidents of the feudal system, soon after its establishment in England, found to be easy or burthensome?

What led to the exacting of Magna Charta?

How was the relation of Lord and Vassal enacted?

What was homage?

What service was due from the vassal to the lord?

Explain the progress of feuds from being merely gratuitous, and held at the lord's will, to being hereditary?

What led to the division of feuds into "proper" and "improper"?

THE ANCIENT ENGLISH TENURES.

ALMOST all the real property of this kingdom is by the policy of our laws supposed to be granted by, dependent upon, and holden of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The *thing holden* is therefore styled a "*tenement*," the possessors thereof "*tenants*," and the manner of their possession a "*tenure*." Thus all the land in the kingdom is supposed to be "holden," mediately or immediately, of the king, who is styled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king: and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B was said to hold of A, and A of the king; or in other words, B held his lands immediately of A, but mediately of the king. The king therefore was styled lord *paramount*; A was both tenant and lord, or was a *mesne* lord: and B was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit, of his land. In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to sir Edward Coke, in the law of England we have not properly *allodium**; which, we have seen, is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

* There are, or were, some remnants of *allodial* possession in the Shetland Islands, where the persons holding the *allodial* lands were denominated *Udallers*.

There seems to have subsisted among our ancestors, *four principal species* of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The *services*, in respect of their quality, were either *free* or *base* services: in respect of their quantity, and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier, or a free man to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were only fit for peasants, or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as, to do military service in person, to pay an assessment in lieu of it, when called upon; or to wind an horn whenever the Scots invaded the realm: which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England till the middle of the last century; and three, of which subsist to this day. Of these Bracton, who wrote under Henry the third, seems to give the clearest and most compendious account, of any author ancient or modern; of which the following is the outline, or abstract: first, where the service was free but uncertain, as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare*, or by *knight-service*. Secondly, where the service was not only free, but also certain, as by fealty only, by rent and fealty, &c. that tenure was called *liberum socagium*, or *free socage*. These were the only free tenures: the others were villenous or servile, as thirdly, where the service was base in its nature, and uncertain as to time or quantity, the tenure was *purum villenagium*, absolute or *pure villenage*. Lastly, where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of *Privileged villenage*, *villenagium privilegiatum*; or it might

be still called socage, from the certainty of its services, but degraded by their baseness into the inferior title of *villeinum socagium*, *villein-socage*.

I. The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi*; was transferred by investiture, or delivering corporal possession of the land, usually called *livery of seisin*; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz. aids, reliefs, primer seisin, wardship, marriage, fines for alienation and escheat.

1. *Aids* were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress; but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner: a necessary consequence of the feudal attachment and fidelity; insomuch that the neglect of doing it, whenever it was in the vassal's power, was, by the strict rigour of the feudal law, an absolute forfeiture of his estate. Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms; the intention of it being to breed up the eldest son and heir apparent of the seignory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion; for daughters' portions were in those days extremely slender; few lords being able to save much out of their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this or any other incumbrances. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants. And one cannot but observe, in this particular, the great resemblance

which the lord and vassal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For with regard to the matter of aids, there were three which were usually raised by the client; viz. to marry the patron's daughter; to pay his debts; and to redeem his person from captivity.

2. *Relief, relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But relief was only payable, if the heir at the death of his ancestor had attained his full age of one-and-twenty years.

3. *Primer seisin* was a feudal burthen, only incident to the king's tenants, and not to those who held of inferior lords. It was a right which the king had when any of his tenants died seised of a knight's fee, to receive of the heir, provided he were of full age, one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life.

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males and sixteen in females.

When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ousterlemain*; that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *magna charta*. However, in consequence of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins.

When the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For, in those heroic times, no person was qualified for deeds of arms

and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony, as was formerly hinted, is supposed to have been the original of the feudal knighthood. This prerogative, of compelling the king's vassals to be knighted, or to pay a fine, was expressly recognised in parliament by the statute *de militibus*, 1 Edw. II.; was exerted as an expedient for raising money by many of our best princes, particularly by Edw. VI. and queen Elizabeth; but yet was the occasion of heavy murmurs when exerted by Charles I.; among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion, of prerogative. However, among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the crown, and it was accordingly abolished by statute 16 Car. I. c. 20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage*, (*maritagium*, as contradistinguished from matrimony,) which in its feudal sense signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without disparagement or inequality: which if the infants refused, they forfeited the value of the marriage to their guardian; that is, so much as a jury would assess, or any one would *bond fide* give to the guardian for such an alliance: and if the infants married themselves without the guardian's consent, they forfeited double the value. This seems to have been one of the greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord should have the restraint and controul of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy: but no tolerable pretence could be assigned why the lord should have the sale, or value of the marriage.

6. Another attendant or consequence of tenure by knight-service, was that of *finés* due to the lord for every alienation, whenever the tenant had occasion to make over his land to another. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*.

7. The last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant from the extinction of the blood of the latter by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and abolished. In such cases the land escheated, or fell back, to the lord of the fee; that is, the tenure was determined by breach of the original condition expressed or implied in the feudal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, shewed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject, and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequences of which in both cases was, that the gift, being determined, resulted back to the lord who gave it.

These were the principal qualities, fruits, and consequences of tenure by knight-service: a tenure, by which the greatest part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the last century*; and which was created, as sir Edward Coke expressly testifies, for a military purpose, viz. for defence of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of a knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and conse-

* Blackstone wrote before the year 1800.

quences. Such was the tenure by *grand serjeanty*, *per magnum servitium*, whereby the tenant was bound, instead of serving the king generally in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation. It was in most other respects like knight-service, only he was not bound to pay aid, or escuage; and, when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little. *Tenure by cornage*, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was, like other services of the same nature, a species of grand serjeanty.

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination for money*: and, in like manner, it was called, in our northern French, *escuage*; being indeed a pecuniary instead of a military service. The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find, in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments, in the time of Henry II., seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and king John was obliged to consent, by his *magna charta*, that no scutage should be imposed without

* Hence in modern French *ecu*, spelt in the older writers *escu*, a crown, and the Italian *scudo*.

consent of parliament. But this clause was omitted in his son Henry III.'s charter; where we only find that scutages or escuage should be taken as they were used to be taken in the time of Henry II.; that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I. c. 5, 6, and many subsequent statutes, it was again provided that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament; such scutages being indeed the ground-work of all succeeding subsidies, and the land-tax of later times.

By the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages, either promised or real, of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else, but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens, which, in consequence of the fiction adopted after the conquest, were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for aids, whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of relief and *primer seisin*; and, if under age, of the whole of his estate during infancy. And then, as sir Thomas Smith very feelingly complains, "when he came to his own, after he was out of wardship, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren," to reduce him still farther, he was yet to pay half a year's profits as a fine for suing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another

woman. Add to this, the untimely and expensive honour of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a licence of alienation.

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of king James I. consented, in consideration of a proper equivalent, to abolish them all; though the plan proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution, for removing the feudal grievance of heritable jurisdictions in Scotland, which has since been pursued and effected by the statute 20 Geo. II. c. 43. King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the crown and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient, seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages, having during the usurpation been discontinued, were destroyed at one blow by the statute 12 Car. II. c. 24, which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisin, and ousterlemains, values and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienations, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmſign, copyholds, and the honorary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property

of this kingdom than even *magna charta* itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of king Charles extirpated the whole, and demolished both root and branches.

QUESTIONS.

Explain the meaning of the words "*tenement*," "*tenant*," and "*tenure*," with reference to the fundamental maxim of the feudal system.

Who was Lord Paramount? Mesne Lord? Tenant Paravail?

What were the four species of lay tenures, existing in the times of our ancestors, to which all the rest may be reduced?

What were the two kinds of services with respect to *quality*?—with respect to their quantity, and the mode of exacting them?

What was knight-service?

What was free socage?

What was pure villenage?

What was villein-socage?

What were the seven fruits and consequences of knight-service?

What was livery of seisin?

What were aids?

What were reliefs?

What was primer seisin?

What were wardships?

What was marriage?

What were fines for alienation?

What was escheat?

What was grand serjeanty?

Explain the origin, history, and consequences of *escuage*?

When were the military tenures abolished, and how?

THE MODERN ENGLISH TENURES.

ALTHOUGH, by the means that were mentioned in the preceding pages, the oppressive or military part of the feudal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since by the statute 12 Car. II. the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court-roll were reserved; nay, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known, and subsisting, called **FREE AND COMMON SOCAGE**. And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that ancient system; since it is that alone to which we can recur, to explain any seeming or real difficulties, that may arise in our present mode of tenure.

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free socage*, consisted also of free and honourable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up, since the statute of Charles the second, almost every other species of tenure.

It seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but, at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called *gavelkind*, which is generally acknowledged

to be a species of socage tenure ; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in free and common socage.

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter: so that the lands of both sorts are now holden by one universal tenure of free and common socage.

The other grand division of tenure mentioned by Bracton, as cited in the preceding chapter, is that of *villanage*, as contradistinguished from *liberum tenementum*, or frank tenure. And this, we may remember, he subdivided into two classes, pure and privileged villanage: from whence have arisen two other species of our modern tenures.

III. From the tenure of *pure villanage* have sprung our present *copyhold tenures*, or tenure by copy of court roll at the will of the lord: in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

Manors are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day: just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest. A manor, *manerium*, a *manendo*, because the usual residence of the owner, seems to have been a district of ground, held by lords or great personages; who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ dominicales*, or demesne lands; being occupied by the lord, or *dominus manerii*, and his servants. The other, or tenemental, lands they distributed among their tenants: which from the different modes of tenure were distinguished by two different names. First, *book-land*, or charter-land, which was held by deed under certain rents and free-services, and in effect differed nothing from the free socage lands: and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion;

being indeed land held in villenage, which we shall presently describe more at large. The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads, and for common or pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court baron, for redressing misdemeanours and nuisances within the manor; and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself is lost.

Now with regard to the *folk-land*, or estates held in villenage, this was a species of tenure neither strictly feudal, Norman, or Saxon; but mixed and compounded of them all: and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as sir William Temple speaks, a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removeable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they, who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition. This they called *villenage*, and the tenants *villeins*, either from the word *vilis*, or else, as sir Edward Coke tells us, *a villa*, because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: resembling the Spartan helotes, to whom alone the culture of lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is,

annexed to the person of the lord, and transferable by deed from one owner to another. They could not leave their lord without his permission; but, if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices: and their services were not only base, but uncertain as to their time and quantity. A villein, in short, was in much the same state with *us*, as lord Molesworth describes to be that of the boors in Denmark, and which Stiernhook attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods: but if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity.

In many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord: and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property. For the children of villeins were also in the same state of bondage with their parents; whence they were called, in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife*. In case of a marriage between a freeman and a neife, or a villein and a free-woman, the issue followed the condition of the father, being free if he were free, and villein if he were villein; contrary to the maxim of the civil law. But no illegitimate child could be born a villein, because by another maxim in our law he is *nullius filius*: and as he can gain nothing by inheritance, it were hard that he should lose his natural freedom by it. The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord; for he might not kill, or maim his villein; though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor,

or the maim of his own person. Neifes indeed had also an appeal of rape, in case the lord violated them by force.

Villeins might be enfranchised by manumission, which is either express or implied: express, as where a man granted to the villein a deed of manumission: implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years; for this was dealing with his villein on the footing of a freeman; it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him; for, as the lord might have a short remedy against his villein, by seizing his goods, which was more than equivalent to any damages he could recover, the law, which is always ready to catch at any thing in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the good-nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them a title to prescribe against their lords; and, on performance of the same service, to hold their lands, in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the customs of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to shew for their estates but these customs, and

admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold*.

Thus copyhold tenures, as sir Edward Coke observes, although very meanly descended, yet come of an ancient house; for, from what has been premised, it appears, that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will. Which affords a very substantial reason for the great variety of customs that prevail in different manors, with regard both to the descent of the estates, and the privileges belonging to the tenants. And those encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute of Charles II., there was hardly a pure villein left in the nation. For sir Thomas Smith testifies, that in all his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks, and friars, had in their confessions, and especially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was, for one christian man to hold another in bondage; so that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with all the abbots and priors, did not in like sort by theirs; for they also had a scruple in conscience to impoverish and despoil the church so much as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still." By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders; their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before; though, in general, the villein services are usually commuted for a small pecuniary quit rent.

Thus much for the ancient tenure of pure villenage, and

the modern one of copyhold at the will of the lord, which is lineally descended from it.

IV. There is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged villenage*, and sometimes of *villain-socage*. This, he tells us, is such as has been held of the kings of England from the conquest downwards; that the tenants herein, "*villana faciunt servitia, sed certa et determinata*:" that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can; but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz. the *tenure in ancient demesne*; to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium*.

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that, whatever changes and alterations these tenures have in process of time undergone, from the Saxon æra to the 12 Car. II., all lay tenures are now in effect reduced to two species, free tenure in common socage, and base tenure by copy of court-roll.

I mentioned lay tenures only, because there is still behind one other species of tenure, reserved by the statute of Charles II., which is of a spiritual nature, and called tenure in frankalmoign.

V. Tenure in *frankalmoign*, in *libera eleemosyna*, or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever. The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the soul of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this,) because this divine service was of a higher and more exalted nature. This is the tenure by which almost all the ancient monasteries and religious houses held their lands, and by which the paro-

chial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day ; the nature of the service being upon the reformation altered, and made conformable to the purer doctrines of the church of England. It was an old Saxon tenure, and continued under the Norman revolution, through the great respect that was shewn to religion and religious men in former times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions ; just as the Druids, among the ancient Britons, had *omnium rerum immunitatem*. And, even at present, this is a tenure of a nature very distinct from all others, being not in the least feudal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden ; but merely a complaint to the ordinary or visitor to correct it. Wherein it materially differs from what was called *tenure by divine service*, in which the tenant was obliged to do some special divine services in certain ; as to sing so many masses, to distribute such a sum in alms, and the like ; which being expressly defined and prescribed, could with no kind of propriety be called free alms ; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor. All such donations are indeed now out of use ; for, since the statute of *quia emptores*, 18 Edw. I., none but the king can give lands to be holden by this tenure. So that I only mention them, because *frankalmoign* is excepted by name in the statute of Charles II., and therefore subsists in many instances at this day.

QUESTIONS.

Did the statute 12 Charles II. utterly abolish the feudal constitution ?

What kind of tenure swallowed up, since this statute, almost all other tenures ?

What is the origin of the modern " copyhold ? "

What is a " manor," and what are its incidents ?

Explain " villenage," and its connection with the system of copyholds.

What is *tenure in frankalmoign* ?

Who can create it, since the statute of 12 Charles II. ?

WILLS OF PERSONAL PROPERTY, AND ADMINISTRATION OF THE GOODS OF THOSE WHO DIE INTESTATE.

TESTAMENTS are of very high antiquity. We find them in use among the ancient Hebrews ; though I hardly think the example usually given of Abraham's complaining that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to shew that he had made him so by will. And indeed a learned writer has adduced this very passage to prove, that in the patriarchal age, on failure of children, or kindred, the servants born under their master's roof succeeded to their inheritance as heirs at law. But, to omit what Eusebius and others have related of Noah's testament, made in writing and witnessed under his seal, whereby he disposed of the whole world, I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings, wherein Jacob bequeaths to his son Joseph a portion of his inheritance double to that of his brethren : which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them ; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens ; but in many other parts of Greece they were totally discountenanced. In Rome they were unknown till the laws of the twelve tables were compiled, which first gave the right of bequeathing ; and, among the northern nations, particularly among the Germans, testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state, which has permitted it in some countries, and denied it in others ; and even where it is permitted by law, it is sub-

jected to different formalities and restrictions in almost every nation under heaven.

With us in England this power of bequeathing is coeval with the first rudiments of the law; for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. But we are not to imagine that this power of bequeathing extended originally to all a man's personal estate. On the contrary, Glanvil will inform us, that by the common law, as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them.

But this law is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration begun. A man may devise the whole of his chattels as freely as he formerly could his third part or moiety.

In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to *die intestate*; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ*, and general trustee of the kingdom. This prerogative the king continued to exercise for some time by his own ministers of justice, and probably in the county court, where matters of all kinds were determined: and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition. Afterwards the crown, in

favour of the church, invested the prelates with this branch of the prerogative: which was done, says Perkins, because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; and he might seize them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money in *pious usus*; and if he did otherwise, he broke the confidence which the law reposed in him. So that properly the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious. And, as he had thus the disposition of intestates' effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct. But even in Fleta's time it was complained, *quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes, nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of pope Innocent IV, written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiæ et pauperum dispensanda est.*" Thus the clergy took to themselves (under the name of church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two-thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the statute of Westm. 2. that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more

truly pious, than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands; yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependants; and therefore the statute 31 Edw. III. c. 11, provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted to be the *next of blood* that is under no legal disabilities. The statute 21 Hen. VIII. c. 5, enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion: and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

Upon this footing stands the general law of administration at this day. Let us now see what are the power and duty of an executor or administrator.

1. He must bury the deceased in a manner suitable to the estate which he leaves behind him.

2. The executor must *prove the will* of the deceased; which is done either in common form, which is only upon his own oath before the ordinary, or his surrogate; or *per testes*, in more solemn form of law, in case the validity of the will be disputed. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually styled the pro-

bate. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him; and he must, by statute 22 & 23 Car. II. c. 10, enter into a bond with sureties, faithfully to execute his trust.

3. The executor or administrator is to make an inventory of all the goods and chattels, whether in possession or action*, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. He is to collect all goods and chattels so inventoried: and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased, and having the same property in his goods as the principal had, when living, and the same remedies to recover them. Whatever is so recovered, that is of a saleable nature, and may be converted into ready money, is called "assets" in the hands of the executor or administrator: that is, sufficient or enough, (from the French *assez*,) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend.

5. The executor or administrator must pay the debts of the deceased.

6. When the debts are all discharged, the legacies claim the next regard; which are to be paid by the executor so far as his assets will extend.

A legacy is a bequest or gift of goods and chattels by testament; and the person to whom it was given is styled the legatee; but the legacy is not perfect without the *assent of the executor*; for if I have a general or pecuniary legacy of 100*l.* or a specific one of a piece of plate, I cannot in either case take it without the consent of the executor. For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient sum left to pay the debts of the testator: the rule of equity being, that a man must be just before he is permitted to be generous. And in case of a deficiency of assets, all the general legacies must *abate* proportionably, in order to pay the debts; but a specific legacy, of a piece of plate, a horse, or the like, is not to abate at all, or allow any thing *by*

* Unpaid debts, and claims against others, are technically said to lie *in action*.

way of abatement, unless there be not sufficient without it. Upon the same principle, if the legatees had been paid their legacies, they are afterwards bound to refund a rateable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid.

If the legatee dies before the testator, the legacy is a lost or lapsed legacy, and shall sink into the *residuum*.

7. When all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship. But this is now altered by st. 1 W. IV. c. 40, and an executor now stands in this respect much on the same footing as an administrator: concerning whom indeed there formerly was much debate, whether or not he could be compelled to make any distribution of the intestate's estate. For, though, after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased, the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law. And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law; the statute of frauds declaring only, that the statute of distributions does not extend to this case. But now these controversies are quite at an end; for by the statute 22 & 23 Car. II. c. 10, explained by 29 Car. II. c. 30, it is enacted, that the surplusage of intestate's estates, except of *femes covert*, which are left as at common law, shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner. *One-third* shall go to the *widow* of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants; if there are no children or legal representatives subsisting, then a *moiety* shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are ad-

mitted among collaterals, farther than the children of the intestate's brothers and sisters. By this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17, if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide the effects in equal portions.

It is obvious to observe, how near a resemblance this statute of distributions bears to our ancient English law, *de rationabili parte bonorum*; spoken of at the beginning of this chapter; and which sir Edward Coke himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding, in point of conscience at least, upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato*; which, and because the act was also penned by an eminent civilian, has occasioned a notion that the parliament of England copied it from the Roman prætor: though indeed it is little more than a restoration, with some refinements and regulations, of our old constitutional law: which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So likewise there is another part of the statute of distributions, where directions are given that no child of the intestate, except his heir at law, on whom he settled in his lifetime any estate in lands, or pecuniary portion equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the *collatio bonorum* of the imperial law: which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland.

QUESTIONS.

What is the earliest instance of a will being made, mentioned in the Scriptures?

Who introduced wills into Athens?

When was the right of making wills introduced among the ancient Romans?

How did the law stand with reference to bequeathing personal property in the reign of Henry II.?

May a man now will away the whole of his personal property?

What became of the personal property of a man who died intestate?

What led to the enactment that the ordinary should pay the debts of an intestate out of the property of such intestate?

At what time were administrators appointed as they at present stand?

To whom is administration granted?

What is the first great duty of an executor or administrator?

How is the will proved?

How is administration taken out where there is no will?

What is the next duty of the executor or administrator?

What are "assets?"

Must debts or legacies be first paid?

What is a legacy?

What is necessary to perfect a legacy?

What is meant by a legacy *abating*—and when does this take place?

What is the difference between *general* and *specific* legacies, in this respect?

Can a legatee be ever called upon to refund a legacy?

What is a *lapsed* legacy?

What must the executor do with the *surplus* or residuum of his deceased's property?

What must an administrator do with it?

How is this surplus distributed?

By what statutes is this distribution appointed?

Does this regulation in any way resemble the rules of the Civil Law on the same subject?

WILLS OF REAL PROPERTY.

By the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament; except only in Kent, and in some ancient burghs and a few particular manors, where their Saxon immunities by special indulgence subsisted. The statute of wills, however, (32 Henry VIII. c. 1, explained by 34 Henry VIII. c. 5,) enacted that all persons being seised in fee-simple*, except married women, infants, idiots, and persons of non-sane memory, might by will and testament in writing devise to any other person, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage; which now, through the alteration of tenures by the statute of Charles the second, amounts to the whole of their landed property, except their copyhold tenements.

Experience soon shewed, how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them, disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person were allowed to be good wills within the statute. To remedy which, the *Statute of Frauds and Perjuries*, 29 Car. II. c. 3, directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses.

* That is in perpetual and absolute ownership.

And a solemnity nearly similar is requisite for revoking a devise by writing ; though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent : as likewise, impliedly, by such a great and entire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child.

QUESTIONS.

Did the Common Law permit a man to will away any higher estates than those for a term of years ?

What was enacted in the reign of Henry VIII. on this subject ?

What great evil in the making of wills was remedied by the Statute of Frauds—and in whose reign was this act passed ?

What did it enact concerning wills of real property ?

Must a will of real property be in writing ?

Must it be signed by the testator ?

When will signature by a person other than the testator be sufficient ?

Must it be subscribed by witnesses ?

By how many ?

Must they subscribe in the testator's presence ?

How may a will of real property be revoked ?

THE NATURE OF PERSONAL PROPERTY.

the name of things personal are included all *sorts of things moveable which may attend a man's person wherever he goes*, and therefore, being only the object of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and immoveable, as lands and houses, and the profits issuing thereout. These being constantly within the reach, and under the protection of the law, were the principal favourites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it indeed was comparatively very trifling, during the scarcity of money and the ignorance of luxurious refinements, which prevailed in the feudal ages. Hence it was, that a tax of the fifteenth, tenth, or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence likewise may be derived the frequent forfeitures inflicted by the common law, of all a man's goods and chattels, for misbehaviours and interferences that at present hardly seem to deserve so severe a punishment. Our ancient law-books, which are founded upon the feudal provisions, do not therefore often descend to regulate this species of property. But of later years, since the introduction and extension of trade and

commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity, and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well-grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to ancient usages, and a certain feudal tincture, which is still to be found in some branches of personal property. *

QUESTIONS.

What are called "things personal?"

Which was the more esteemed by our ancestors—real or personal property, and why?

Does this account for the number and weight of the taxes anciently imposed upon one of these two kinds of property? How?

Has any alteration taken place in latter times, in the estimation of personal property? Why?

THE SUPERIOR COURTS OF LAW AND OF EQUITY.

By the ancient Saxon constitution there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual causes: viz. the *wittenagemote*, or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the conquest the ecclesiastical jurisdiction was diverted into another channel; and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton and other ancient authors *aula regia*, or *aula regis*. This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person: such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these, there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar business it was to keep the king's seal, and examine all such writs, grants, and letters, as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and likewise the matters of the revenue; and over all presided one special magistrate,

called the chief justiciar or *capitalis justiciarius totius Angliæ*; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people, and dangerous to the government which employed him.

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burthensome to the subject. Wherefore king John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of *magna carta*, and enacts, "*that COMMUNIA PLACITA non sequantur curiam regis, sed teneantur in aliquo loco certo.*" This certain place was established in Westminster-hall, the place where the *aula regis* originally sate, when the king resided in that city, and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judge became so too, and a chief with other justices of the "common pleas" was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood; and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it. This precedent was soon after copied by king Philip the Fair in France, who about the year 1302 fixed the parliament of Paris to abide constantly in that metropolis; which before used to follow the person of the king wherever he went, and in which he himself used frequently to decide the causes that were there depending: but all were then referred to the sole cognizance of the parliament and its learned judges. And thus also in 1495 the emperor Maximilian I. fixed the imperial chamber, which before always travelled with the court and household, to be held constantly at Worms, from whence it was afterwards translated to Spire.

The *aula regia* being thus stript of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of king Henry III. And, in further pursuance of this example, the other several offices of the chief justiciar were, under Edward the first, who new modelled the whole frame of our judicial polity, subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other; the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal: and the sole cognizance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two sorts: pleas of the crown, which comprehend all crimes and misdemeanors, wherein the king, on behalf of the public, is the plaintiff; and common pleas, which include all civil actions, depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas: which is a court of record, and is styled by sir Edward Coke the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal, pleas between man and man are likewise here determined; though in most of them the king's bench has also a concurrent authority.

The judges of the Common Pleas are at present five in one chief and four puisne justices, created by the

king's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These it takes cognizance of, as well originally, as upon removal from the inferior courts before mentioned.

The court of King's Bench, so called because the king used formerly to sit there in person, the style of the court still being *coram ipso rege*, is the supreme court of common law in the kingdom; consisting of a chief justice and four *puisné* justices, who are by their office the sovereign conservators of the peace and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do; he did not, neither by law is he empowered to determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority.

This court, which, as we have said, is the remnant of the *aula regis*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king wherever he goes; for which reason all process issuing out of this court in the king's name is returnable "*ubique fuerimus in Anglia.*" It hath indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown; but might remove with the king to York or Exeter, if he thought proper to command it. And we find that, after Edward I. had conquered Scotland, it actually sat at Roxburgh. And this moveable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the justices of this court are "*capitales, generales, perpetui et majores; a latere regis residentes qui omnium aliorum corrigere tenentur injurias et errores.*" And it is moreover especially provided in the *articuli super cartas*, that the king's chancellor, and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other

specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown-side or crown-office; the latter in the plea side of the court.

The court of Exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also. It is a very ancient court of record, set up by William the conqueror, as a part of the *aula regia*, though regulated and reduced to its present order by king Edward I.; and intended principally to order the revenues of the crown, and to recover the king's debts and duties. It is called the the exchequer, *scaccharium*, from the chequed cloth, resembling a chess-board, which covers the table there; and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the exchequer, which manages the royal revenue, and with which these commentaries have no concern; and the court or judicial part of it, which is again subdivided into a court of equity, and a court of common law.

The high court of chancery is, in matters of civil property, by much the most important of any of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides there, the lord chancellor, or *cancellarius*; who, sir Edward Coke tell us, is so termed *a cancellando*, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction. But the office and name of chancellor, however derived, was certainly known to the courts of the Roman emperors: where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state: and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such

other public instruments of the crown, as were authenticated in the most solemn manner: and, therefore, when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper, whose authority by statute 5 Eliz. c. 18, is declared to be exactly the same, is with us at this day created by the mere delivery of the king's great seal into his custody, whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedence to every temporal lord. He is a privy counsellor by his office, and according to lord chancellor Ellesmere, prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic, (for none else were then capable of an office so conversant in writings, and presiding over the royal chapel, he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks per annum in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery, wherein, as in the exchequer, there are two distinct tribunals; the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

The ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like; when the king hath been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right. On proof of which, as the king can never be supposed intentionally to do any wrong, the law questions not but he will immediately redress the injury; and refers that conscientious task to the chancellor, the keeper of his conscience.

In this ordinary, or legal, court is also kept the *officina justitiæ*; out of which all original writs that pass under

the great seal, all commissions of charitable uses, sewers, bankruptcy, idiotcy, lunacy, and the like, do issue; and for which it is always open to the subject, who may there at any time demand and have, *ex debito justitiæ*, any writ that his occasions may call for. These writs, relating to the business of the subject, and the returns to them, were, according to the simplicity of ancient times, originally kept in a hamper, in *hanaperio*; and the others, relating to such matters wherein the crown is immediately or mediately concerned, were preserved in a little sack or bag, in *parva бага*: and thence hath arisen the distinction of the hanaper office, and petty bag office, which both belong to the common law court in chancery.

But the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country *, at any time; and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans; the *jus prætorium*, or discretion of the prætor, being distinct from the *leges* or standing laws: but the power of both centered in one and the same magistrate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases, by the principles of equity. With us too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton, composed under the auspices and in the name of Edward I. and treating particularly of courts and their several jurisdictions, is there a syllable to be found relating to the equitable jurisdiction of the court of chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a

* Except the United States of America, which derived it from England.

harsh or imperfect judgment, the application for redress used to be to the king in person, assisted by his privy council; (from whence also arose the jurisdiction of the court of request; which was virtually abolished by the statute 16 Car. I. c. 10,) and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia*, but also after its dissolution, in the reign of king Edward I.; and perhaps during its continuance, in that of Henry II.

In the ancient treatise, entitled *diversité des courtes*, supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court: but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes, though rarely, a statesman: no lawyer having sate in the court of chancery from the time of the chief justices Thorpe and Knyvet, successively chancellors to king Edward III. in 1372 and 1373, to the promotion of sir Thomas More by king Henry VIII. in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers, or churchmen, according as the convenience of the times and the disposition of the prince required, till serjeant Puckering was made lord keeper in 1592: from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was entrusted to Dr. Williams, then dean of Westminster; but afterwards bishop of Lincoln; who had been chaplain to lord Ellesmere, when chancellor.

In the time of lord Ellesmere, A. D. 1616, arose that notable dispute between the courts of law and equity, set on foot by sir Edward Coke, then chief justice of the court of king's bench: *whether a court of equity could give relief after or against a judgment at the common law.* This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the coun-

sel, and even a master in chancery, for having incurred a *præmunire*, by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition. This matter being brought before the king, was by him referred to his learned counsel, for their advice and opinion; who reported so strongly in favour of the courts of equity, that his majesty gave judgment in their behalf; but, not contented with the irrefragable reasons and precedents produced by his counsel, (for the chief justice was clearly in the wrong,) he chose rather to decide the question by referring it to the plenitude of his royal prerogative. Sir Edward Coke submitted to the decision, and thereby made atonement for his error: but this struggle, together with the business of *commendams*, in which he acted a very noble part, and his controlling the commissioners of sewers, were the open and avowed causes, first of his suspension, and soon after of his removal, from his office.

Lord Bacon, who succeeded lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I., did little to improve upon his plan; and even after the restoration the seal was committed to the earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the earl of Shaftesbury, who, though a lawyer by education, had never practised at all. Sir Heneage Finch, who succeeded in 1673, and became afterwards Earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and

rational foundations; which have also been extended and improved by many great men, who have since presided in chancery. And from that time to this, the power and business of the court have increased to an amazing degree.

From this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but only a definitive judgment: 2. That on writs of error the house of lords pronounces the judgment on appeals it gives direction to the court below to rectify its own decree. • •

The next court that I shall mention, is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of Exchequer Chamber, in which writs of error from any one of the three superior courts of King's Bench, Common Pleas, or Exchequer, are determined by the judges of the other two.

The house of peers is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law, committed by the courts below. To this authority this august tribunal succeeded of course upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court; and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no farther appeal is permitted; but every subordinate tribunal must conform to their determinations: the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that, if possible, they will make themselves masters of those questions which they undertake to decide, and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise

them : since upon their decision all property must finally depend.

I must also mention another species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries, to the foregoing ; I mean the courts of *assise* and *nisi prius*.

These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom, (except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts ; to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster-hall. These judges of assise came into use in the room of the ancient justices in eyre, *justiciarii in itinere* ; who were regularly established, if not first appointed, by the parliament of Northampton, A. D. 1176, 22 Hen. II. with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof : and they afterwards made their circuit round the kingdom once in seven years for the purpose of trying causes. They were afterwards directed by *magna carta*, c. 12, to be sent into every county once a year, to take or receive the verdict of the jurors or recognitors in certain actions, then called recognitions or assises, the most difficult of which they are directed to adjourn into the court of common pleas to be there determined. The itinerant justices were sometimes mere justices of assise, or of dower, or of gaol-delivery, and the like ; and they had sometimes a more general commission to determine all manner of causes, being constituted *justiciarii ad omnia placita* : but the present justices of assise and *nisi prius* are more immediately derived from the statute Westm. 2. 13 Edw. I. c. 30, which directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county.

The judges upon their circuits now sit by virtue of five several authorities. 1. The commission of the peace. 2. A commission of oyer and terminer. 3. A commission of general gaol-delivery. The consideration of all which belongs properly to the criminal laws. But the fourth commission is, 4, A commission of assise, directed to the justices and serjeants therein named, to take, together with

their associates, assises in the several counties; that is, to take the verdict of a peculiar species of jury, called an assise, and summoned for the trial of landed disputes, of which hereafter. The other authority is, 5. That of *nisi prius*, which is a consequence of the commission of assise being annexed to the office of those justices by the statute of Westm. 2. 13 Edw. I. c. 30, and it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. These by the course of the courts are usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises; but with this proviso, *nisi prius*, 'unless before' the day prefixed, the judges of assise come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas term, which saves much expense and trouble. These commissions are constantly accompanied by writs of association, in pursuance of the statutes of Edw. I. and II. before mentioned: whereby certain persons, usually the clerk of assise and his subordinate officers, are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assises, &c.; that a sufficient supply of commissioners may never be wanting. But, to prevent the delay of justice by the absence of any of them, there is also issued of course a writ of *si non omnes*; directing that if all cannot be present, any two of them, a justice or serjeant being one, may proceed to execute the commission.

These are the several courts of common law and equity, which are of public and general jurisdiction throughout the kingdom. And, upon the whole, we cannot but admire the wise economy and admirable provision of our ancestors, in settling the distribution of justice in a method so well calculated for cheapness, expedition, and ease. By the constitution which they established, all trivial debts, and injuries of small consequence, were to be recovered or redressed in every man's own county, hundred, or perhaps parish. Pleas of freehold, and more important disputes of property, were adjourned to the king's court of common pleas, which was fixed in one place for the benefit of the whole kingdom. Crimes and misdemeanors were to be examined in a court by themselves; and matters of the revenue in another dis-

tinct jurisdiction. Now indeed, for the ease of the subject and greater despatch of causes, methods have been found to open all the three superior courts for the redress of private wrongs: which have remedied many inconveniences, and yet preserved the forms and boundaries handed down to us from high antiquity. If facts are disputed, they are sent down to be tried in the country by the neighbours; but the law, arising upon those facts, is determined by the judges above: and, if they are mistaken in point of law, there remain in both cases two successive courts of appeal, to rectify such their mistakes. If the rigour of general rules does in any case bear hard upon individuals, courts of equity are open to supply the defects, but not sap the fundamentals, of the law. Lastly, there presides over all one great court of appeal, which is the last resort in matters both of law and equity; and which will therefore take care to preserve an uniformity and *æquilibrium* among all the inferior jurisdictions: a court composed of prelates selected for their piety, and of nobles advanced to that honour for their personal merit, or deriving both honour and merit from an illustrious train of ancestors: who are formed by their education, interested by their property, and bound upon conscience and honour, to be skilled in the laws of their country. This is a faithful sketch of the English juridical constitution, as designed by the masterly hands of our forefathers. Of which the great original lines are still strong and visible: and, if any of its minuter strokes are by the length of time at all obscured or decayed, they may still be with ease restored to their pristine vigour.

QUESTIONS.

How many Superior Courts of Justice were there in the times of the Saxons?

What was the *Wittenagemote*?

What was the *Aula Regia*, and by whom, when, and why founded?

Who was the Chief Justiciar?

What led to make the Court of Common Pleas stationary?

Was this example followed by any foreign kingdoms?

What changes did Edward I. make in the courts of justice?

What is the difference between Pleas of the Crown, and Common

What is the name of the Supreme Court of Common Law ?

Can the King *himself* hear and determine causes in this Court ?

Is this a stationary Court ?

What is the nature of the jurisdiction of this Court ?

Who set up the Court of Exchequer ?

What are its chief duties supposed to be ?

Why is it called "the Exchequer ?"

What is the word "Chancellor" said to be derived from ?

State what you recollect of the nature and duties of the chancellor in ancient Rome and the Romish church ?

How is the Lord Chancellor appointed ?

What are his powers and duties ?

What are the hanaper office, and petty bag office ?

What is the meaning of "Equity" as distinguished from "Law" ?

Did any but lawyers ever preside over the Court of Chancery ?

What was the great dispute between Lord Chancellor Ellesmere and sir Edward Coke ? How did it terminate ?

Who was the Earl of Nottingham, and what did he do for the Court of Chancery ?

What is the judicial capacity of the House of Lords ?

What are the Courts of Assise and Nisi Prius ?

By what authority do the judges sit, upon circuit ?

Explain the meaning of the words "Nisi Prius" as used in their legal sense.

THE WRIT OF HABEAS CORPUS.

THE writ of *habeas corpus*, is the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster for removing prisoners from one court to another for the more easy administration of justice.

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, issuing out of the court of king's bench not only in term time, but also during the vacation, by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term should intervene, and then it may be returned in court. And since the statutes 16 Car. I. c. 10, and 56 G. III. c. 100, every subject of the kingdom is equally entitled to the benefit of the common law writ, in either the king's bench, common pleas, or exchequer, at his option. It hath also been said, and by very respectable authorities, that the like *habeas corpus* may issue out of the court of chancery in vacation: but upon the famous application to lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found.

where the chancellor had issued such a writ in vacation, and therefore his lordship refused it.

In the king's bench and common pleas it is necessary to apply for it by motion to the court, as in the case of all other prerogative writs (*certiorari*, prohibition, *mandamus* &c.) which do not issue of mere course without shewing *some probable cause* why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan, "it is granted on motion, because it cannot be had of course; and there is therefore no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable, because, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. So that, if it issued of mere course, without shewing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic, confined for insanity or other prudential reasons, might obtain temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court. And therefore, sir Edward Coke, when chief justice, did not scruple in 13 Jac. I. to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing, upon his own shewing, sufficient grounds to confine him. On the other hand, if a probable ground be shewn, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, or privy council, or any other.

In a former part of these commentaries we expatiated at large on the personal liberty of the subject*. This was shewn to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law.

* Ante, pp. 66—69.

A doctrine coeval with the first rudiments of the English constitution ; and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest : asserted afterwards and confirmed by the conqueror himself and his descendants : and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *magna charta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society ; and in the end would destroy all civil liberty, by rendering its protection impossible : but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is, which induces the absolute necessity of expressing upon every commitment the reason for which it is made : that the court upon a *habeas corpus* may examine into its validity ; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I. the court of king's bench, relying on some arbitrary precedents, and those perhaps misunderstood, determined that they could not upon a *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the petition of right, 3 Car. I. which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms, including also the long vacation, to deliver an opinion how far such a charge was bailable. And, when at length they agreed that it was, they however annexed a condition of finding sureties for their good behaviour, which still protracted their imprisonment, the chief justice, sir Nicholas Hyde, at the same time declaring, that "if they were again

remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years.

These pitiful evasions gave rise to the statute 16 Car. I. c. 10. § 8. whereby it is enacted, that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench or common pleas; who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still in the case of Jenks, before alluded to, who in 1676 was committed by the king in council for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement, by law; the chief justice, as well as the chancellor, declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c. whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party: and many other vexatious shifts were practised to detain state prisoners in custody. But whoever will attentively consider the English history, may observe, that the flagrant abuse of any power, by the crown or its ministers, has always been productive of a struggle, which either discovers the exercise of that power to be contrary to law, or, if legal, restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous *habeas corpus* act, 31 Car. II. c. 2. which is frequently considered as another *magna charta* of the kingdom; and by consequence and analogy has also in

subsequent times reduced the general method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

The statute itself enacts, 1. That on complaint and request in writing by and on behalf of any person committed and charged with any crime*, (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony; or upon suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process,) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall, unless the party has neglected for two terms to apply to any court for his enlargement, award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority, specified in the act, shall for the first offence forfeit 100*l.* and for the second offence 200*l.* to the party grieved, and be disabled to hold his office. 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail; unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the

* This is now extended to other cases by 56 G. III. c. 100.

second term or session, he shall be discharged from his imprisonment for such imputed offence : but that no person, after the assizes shall be opened for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended ; but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas ; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l*. 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported ; or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions : on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved a sum not less than 500*l*. to be recovered with treble costs ; shall be disabled to bear any office of trust or profit ; shall incur the penalties of *præmunire** ; and shall be incapable of the king's pardon.

By these admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries, and has happened in England during temporary suspensions of the statute, that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten. .

QUESTIONS.

- What does the writ of *habeas corpus ad subjiciendum* direct ?
- What must be shewn before a judge will issue this writ ?
- On what grounds did sir Edward Coke refuse a *habeas corpus* to one confined by the court of admiralty for piracy ?

* These were forfeiture of goods, loss of civil rights, and imprisonment.

Why is the reason of every *commitment*, expressed upon the face of it?

What was it that produced the *Petition of Right*?

How was this illustrated in the case of Mr. Selden?

What led to the enactment of the Habeas Corpus Act—and in what reign was it passed?

What steps must be taken to obtain the advantages of the Habeas Corpus Act?

What are the cases of committal for crime, which are expressly excepted from the operation of the Habeas Corpus Act?

Within what time must a prisoner be brought up under this act?

What is the penalty incurred by officers and keepers who infringe the Habeas Corpus Act?

What would be the consequences of recommitting a person for the same offence as that in respect of which he had been once delivered by Habeas Corpus?

Can a Habeas Corpus run into a county palatine—into the islands of Jersey and Guernsey?

THE SUPPOSED UNCERTAINTY OF THE LAW.

THE uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humour, that he who should attempt to refute it would be looked upon as a man, who was either incapable of discernment himself, or else meant to impose upon others. Yet it may not be amiss to inquire a little wherein this uncertainty, so frequently complained of, consists; and to what causes it owes its original.

It hath been sometimes said to owe its original to the number of our municipal constitutions, and the multitude of our judicial decisions; which occasion, it is alleged, abundance of rules that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. The fact of multiplicity is allowed; and that thereby the researches of the student are rendered more difficult and laborious; but that, with proper industry, the result of those inquiries will be doubt and indecision, is a consequence that cannot be admitted. People are apt to be angry at the want of simplicity in our laws: they mistake variety for confusion, and complicated cases for contradictory. They bring us the examples of arbitrary governments, of Denmark, Muscovy, and Prussia; of wild and uncultivated nations, the savages of Africa and America; or of narrow domestic republics in ancient Greece, and modern Switzerland; and unreasonably require the same paucity of laws, the same conciseness of practice, in a nation of freemen, a polite and commercial people, and a populous extent of territory.

In an arbitrary despotic government, where the lands are at the disposal of the prince, the rules of succession, or the mode or enjoyment, must depend upon his will and

pleasure. Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds in a stronger degree with regard to goods and chattels, and the contracts relating thereto. Under a tyrannical sway, trade must be continually in jeopardy, and of consequence can never be extensive: this therefore puts an end to the necessity of an infinite number of rules, which the English merchant daily recurs to for adjusting commercial differences. Marriages are there usually contracted with slaves; or at least women are treated as such: no laws can be therefore expected to regulate the rights of dower, jointures, and marriage settlements. Few also are the persons who can claim the privilege of any laws; the bulk of those nations, viz. the commonalty, boors, or peasants, being merely villeins and bondmen. Those are therefore left to the private coercion of their lords; are esteemed, in the contemplation of these boasted legislators, incapable of either right or injury, and of consequence are entitled to no redress. We may see, in these arbitrary states, how large a field of legal contests is already rooted up and destroyed.

Again; were we a poor and naked people, as the savages of America are, strangers to science, to commerce, and the arts as well of convenience as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we meet upon the road, and so put a short end to every controversy. For in a state of nature, there is no room for municipal laws: and the nearer any nation approaches to that state, the fewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdsmen, all their laws were contained in ten or twelve tables; but as luxury, politeness, and dominion increased, the civil law increased in the same proportion; and swelled to that amazing bulk which it now occupies, though successively pruned and retrenched by the emperors Theodosius and Justinian.

In like manner we may lastly observe, that, in petty states and narrow territories, much fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a private family are short and well known; those of a prince's household are necessarily more various and diffuse.

The causes therefore of the multiplicity of the English

laws are, the extent of the country which they govern; the commerce and refinement of its inhabitants; but, above all, the liberty and property of the subject. These will naturally produce an infinite fund of disputes, which must be terminated in a judicial way; and it is essential to a free people, that these determinations be published and adhered to; that their property may be as certain and fixed as the very constitution of their state. For though in many other countries every thing is left in the breast of the judge to determine, yet with us he is only to declare and pronounce, not to make or new model, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes, though rarely, interfere with each other: either because succeeding judges may not be apprised of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at present: or in fine, because of the natural imbecility, and imperfection that attends all human proceedings. But wherever this happens to be the case in any material point, the legislature is ready, and from time to time, both may, and frequently does, intervene to remove the doubt; and, upon due deliberation had, determines by a declaratory statute how the law shall be held for the future.

Whatever instances therefore of contradiction or uncertainty may have been gleaned from our records or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system. Indeed the reverse is most strictly true. The English law is less embarrassed with inconsistent resolutions and doubtful questions, than any other known system of the same extent and the same duration. I may instance the civil law: the text whereof, as collected by Justinian and his agents, is extremely voluminous and diffuse; but the idle comments, obscure glosses, and jarring interpretations grafted thereupon by the learned jurists are literally without number. And these glosses, which are more private opinions of scholastic doctors, (and not, like our books of reports, judicial determinations of the court,) are all of authority sufficient to be vouched and relied on:

which must needs breed great distraction and confusion in their tribunals. The same may be said of the canon law ; though the text thereof is not of half the antiquity with the common law of England ; and though the more ancient any system of laws is, the more it is liable to be perplexed with the multitude of judicial decrees. When, therefore, a body of laws, of so high antiquity as the English, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid the foundations, and great care and circumspection in such as have built the superstructure.

But is not, it will be asked, the multitude of law-suits, which we daily see and experience, an argument against the clearness and certainty of the law itself? By no means : for among the various disputes and controversies which are daily to be met with in the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law. An action shall seldom be heard of, to determine a question of inheritance, unless the fact of the descent be controverted. But the dubious points which are usually agitated in our courts, arise chiefly from the difficulty there is of ascertaining the intentions of individuals, in their solemn dispositions of property ; in their contracts, conveyances, and testaments. It is an object indeed of the utmost importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or their various designations marked out by the prudence, convenience, necessities, or even by the caprice of their owners : yet to investigate the intention of the owner is frequently matter of difficulty, among heaps of entangled conveyances or wills of a various obscurity. The law rarely hesitates in declaring its own meaning ; but the judges are frequently puzzled to find out the meaning of others. Thus the powers, the interest, the privileges, and properties, of a tenant for life, and a tenant in tail, are clearly distinguished and precisely settled by law : but, what words in a will shall constitute this or that estate, has occasionally been disputed for more than two centuries past ; and will continue to be disputed as long as the carelessness, the ignorance, or singularity of the testators shall continue to clothe their intentions in dark or new-fangled expressions.

But notwithstanding so vast an accession of legal controversies arising from so fertile a fund as the ignorance and

wilfulness of individuals, these will bear no comparison in point of number to those which are founded upon the dishonesty and disingenuity of the parties: by either their suggesting complaints that are false in fact, and thereupon bringing groundless actions; or by their denying such facts as are true, in setting up unwarrantable defences. *Ex facto oritur jus*: if, therefore, the fact be perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial. And, in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of probation or trial, which the law of the country has ordained for a criterion of truth and falsehood.

These modes of probation or trial form in every civilized country the great object of judicial decisions. And experience will abundantly shew, that above a hundred of our law-suits arise from disputed facts, for one where the law is doubted of. About twenty days in the year are sufficient in Westminster-Hall, to settle, upon solemn argument, every demurrer or other special point of law that arises throughout the nation: but two months are annually spent in deciding the truth of facts, before six distinct tribunals, in the several circuits of England: exclusive of Middlesex and London, which afford a supply of causes much more than equivalent to any two of the largest circuits.

QUESTIONS.

What are the reasons, of the greater multiplicity of the laws, in a free state, than under an arbitrary government?

How may this be illustrated by the twelve tables of laws in early Rome?

What are the causes of the multiplicity of the English laws?

Which is freer from inconsistent and doubtful questions—the English, or the Civil Law?

From what source do the chief difficulties that are agitated in our courts of law arise?

What is the nature of the difficulties of decision arising from the dishonesty and disingenuousness of parties?

Explain the phrase "*ex facto oritur jus*."

Which occupies most of the time of the Judges—the settlement of questions of law, or of fact?

THE EXAMINATION OF WITNESSES VIVA VOCE.

THE open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law ; where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There, an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language ; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled : and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance : for, besides the respect and awe with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness, in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them : and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. These are

a few of the advantages attending this, the English, way of giving testimony *ore tenus*. Which was also indeed familiar among the ancient Romans, as may be collected from Quintilian ; who lays down very good instructions for examining and cross-examining witnesses *vivâ voce*. And this, or somewhat like it, was continued as low as the time of Hadrian : but the civil law, as it is now modelled, rejects all public examination of witnesses.

QUESTIONS.

State the chief advantages of open *vivâ voce* evidence over every other species of evidence.

Was this mode of obtaining evidence known among the Romans ?

Does the Civil Law now admit of the open examination of witnesses ?

TRIAL BY JURY.

THE trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. It is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals. A constitution that I may venture to affirm, has, under Providence, secured the just liberties of this nation for a long succession of ages. And, therefore, a celebrated French writer, who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those in England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.

Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted

reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees: it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury, whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates, is a step towards establishing aristocracy, the most oppressive of absolute governments. The feudal system, which, for the sake of military subordination, pursued an aristocratical plan in all its arrangements of property, had been intolerable in times of peace, had it not been wisely counterpoised by that privilege, so universally diffused through every part of it, the trial by the feudal peers. And in every country on the continent, as the trial by the peers has been gradually disused, so the nobles have increased in power, till the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow of regal government, unless where the miserable commons have taken shelter

under absolute monarchy, as the lighter evil of the two. And, particularly, it is a circumstance well worthy an Englishman's observation, that in Sweden the trial by jury, that bulwark of northern liberty, which continued in its full vigour so lately as the middle of the last century, is now fallen into disuse: and that there, though the regal power is in no country so closely limited, yet the liberties of the commons are extinguished, and the government is degenerated into a mere aristocracy. It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power this valuable institution in all its rights; to restore it to its ancient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to amend it, wherever it is defective: and, above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty.

QUESTIONS.

On what grounds does Blackstone differ from Montesquieu, who concludes that because Rome, Sparta, and Carthage, have lost their liberties, therefore those of England in time must perish?

What would be the evils attending the intrusting the administration of justice entirely to the magistracy? or to the people at large?

Explain the principles on which the adjustment of matters of law is left to the Judges, and of fact to the Jury?

What was it that prevented the feudal system from being intolerable in times of peace?

What has been the effect, in the countries upon the Continent, of the gradual disuse of *trial by the Peers*?

How was Sweden situated, in this respect?

What are the obligations under which every Englishman lies with reference to trial by Jury?

CRIMES AND MISDEMEANORS.

THE knowledge of that branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For, as a very great master * of the crown law has observed upon a similar occasion, no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices, and ungovernable passions of others, the instability of all human affairs,* and the numberless unforeseen events, which the compass of a day may bring forth, will teach us, upon a moment's reflection, that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms: though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanors" only.

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals: public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole

* Sir Michael Foster.

community, considered as a community, in its social aggregate capacity. As, if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury; but as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to private property; but were that all, a civil satisfaction in damages might atone for it: the public mischief is the thing for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong; which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe but it affords room for a private compensation also: and herein the distinction of crimes from civil injuries is very apparent. For instance; in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment: and the party beaten may also,

have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages. So also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment, as a common offence to the whole kingdom and all his majesty's subjects: but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury, as for the public wrong.

Upon the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: viz. not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent, but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish for the government and tranquillity of the whole.

QUESTIONS.

Why is it of such great importance for every one to be acquainted with the criminal law?

Is there any distinction between *crimes* and *misdeemeanors*?

What is the distinction between crimes and misdemeanors, and civil injuries?

Why is treason a crime of the highest magnitude?

What kind of remedy does the law allow for a battery—and how does this illustrate the distinction between crimes and civil injuries?

State the case of a ditch dug across a highway, occasioning an injury to an individual?

CERTAIN EXCUSES FOR THE COMMISSION OF A CRIME, RECOGNIZED BY THE LAW OF ENGLAND.

ALL the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this, single consideration, *the want or defect of will*. • An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiae*, a fixed design or will to do an unlawful act, is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vitious will without a vitious act is no civil crime, so, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and secondly, an unlawful act consequent upon such vitious will.

Now there are three cases, in which the will does not join with the act: 1. Where there is a *defect of understanding*. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else than a determination of one's choice to do, or to abstain from, a particular action: he, therefore, that has no understanding, can have no will,

to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party, but not called forth and exerted at the time of the action done; *which is the case of all offences committed by chance or ignorance.* Here the will sits reuter; and neither concurs with the act, nor disagrees to it. 3. Where the action is *constrained by some outward force and violence.* Here the will counteracts the deed; and is so far from concurring with, that it loaths and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which may be referred to the second; and compulsion or necessity, which may properly rank in the third.

I. First, we will consider the case of *infancy*, or non-age; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever.

The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge or a highway, and other similar offences: for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit,) for these an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty-one.

With regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open; and from thence till the offender was fourteen, he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but under twelve it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which

he in fact committed. But by the law as it now stands and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem*." Under seven years of age indeed an infant cannot be guilty of felony; for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony. Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted, and suffer death. Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged: because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century, where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Thus also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment. But, in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction.

The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an idiot or lunatic. For the rule of law as to the latter, which may easily be adapted to the former, is, that "*furiosus furore solum punitur*."

In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced: and if, after judgment, he becomes of nonsane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed, in the bloody reign of Henry the eighth, a statute was made, which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. For, as is observed by sir Edward Coke, the execution of an offender is for example "*ut poena ad paucos, metus ad omnes perveniat*:" but so it is not when a madman is executed; but should be a miserable spectacle, both against law and of extreme inhumanity and cruelty, and can be no example to others." But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency. Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting, unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subjects*.

Thirdly; as to artificial voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy; our law

* And therefore by several statutes their apprehension and confinement are provided for.

looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour. A drunkard, says sir Edward Coke, who is *voluntarius daemon*, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: *nam tunc crimen ebrietas, et incendit, et detegit*. It hath been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence which may be necessary to make the blood move in Norway, would make an Italian mad. A German therefore, says the president Montesquieu, drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that he who committed a crime when drunk, should receive a double punishment;" one for the crime itself, and the other for the ebriety which prompted him to commit it. The Roman law indeed made great allowances for this vice: "*per vinum delapsis capitalis poena remittitur*." But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another.

A fourth deficiency of will, is where a man commits an unlawful act by misfortune or chance, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed, which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief happens to follow from the performance of a lawful act, the party stands excused from all guilt; but if a man be doing any thing unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse: for, being guilty of one offence in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.

Fifthly; ignorance, or mistake, is another defect of will;

When a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As, if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action: but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman*.

A sixth species of defect of will is that arising from compulsion and inevitable necessity. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will, if left to itself, would reject. As punishments are therefore only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

Of this nature, in the first place, is the obligation of civil subjection, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientie*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question, I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the civil tribunal. The sheriff who burnt Latimer and Ridley, in the bigoted days of

* There is one case in which ignorance of the law is an excuse; it is where the act committed has been rendered penal by a statute enacted so short a time before the commission of the act in question, that it was impossible for the person accused to have known of it. *So resolved by the Judges in Rex v. Bailey, R. & R. 1.*

queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.

As to persons in private relations; the principal case where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband: for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master; though in some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband, or even in his company, (which the law construes a coercion,) she is not guilty of any crime; being considered as acting by compulsion, and not of her own will. Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of king Ina, the West Saxon. And it appears that, among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave dismissed: "*proculdubio quod alterum libertas, alterum necessitas impelleret.*" But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives, this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like: not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also, (the highest crime which a member of society can, as such, be guilty of,) no plea of marriage shall excuse the wife: no presumption of the husband's coercion shall extenuate her guilt: as well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of

social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. And *in all cases*, where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any feme-sole.

Another species of compulsion or necessity is what our law calls *duress per minas*; or threats and menaces, which induce a fear of death, or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be just and well-grounded, such "*qui cadere possit in virum constantem non timidum et meticulosum*," as Bracton expresses it in the words of the civil law. Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace. This however seems, only, or at least, principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an *innocent person*; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent. But in such a case he is permitted to kill *the assailant*; for there the law of nature, and self-defence, its primary canon, have made him his own protector.

There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. And that is when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the less pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity, where a man by the commandment of the law is bound

to arrest another for any capital offence, or disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony, which the killing would otherwise amount to.

There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz. whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? And this both Grotius and Puffendorf, together with many other of the foreign jurists*, hold, in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods by a kind of tacit confession of society is revived. And some even of our own lawyers have held the same, though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present. And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero, who holds that "*suum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*;" but also the Jewish law, as certified by king Solomon himself: "if a thief steal to satisfy his soul when he is hungry, he shall restore seven-fold, and shall give all the substance of his house;" which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason; for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by baron Puffendorf, and whereon he builds his princi-

* And Archdeacon Paley, in his *Moral Philosophy*, (bk. ii. ch. xi. *ad finem*,) lays down a similar doctrine.

pal arguments: which, however they may hold upon the continent, where the parsimonious industry of the natives orders every one to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful for denying this privilege to the necessitous; especially when we consider, that the king, on the representation of his ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical, and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigour. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person; which extend as well to the will as to the other qualities of his mind. I mean the case of the king; who, by virtue of his royal prerogative, is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would have been the consequence if the king were to act thus and thus: since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance.

QUESTIONS.

To what single consideration may all these "excuses" be reduced?

What is essential to make a complete *crime*, cognizable by human laws?

Why is some *overt act* necessary, before a man is liable to punishment in any temporal jurisdiction?

What are the three cases in which the *will* does not join with the *act*?

342 EXCUSES FOR THE COMMISSION OF CRIME.

Are there any acts for which an 'infant' is liable between the ages of fourteen and twenty-one?

What was the ancient Saxon law, and what is the present law, as to ascertaining the capacity of an infant to commit a crime?

Enumerate the offences and their circumstances, for which children of eight, nine, ten, and thirteen years of age, have been sentenced to death, and suffered it.

When is an idiot or lunatic held responsible for his criminal acts?

What is the effect of a prisoner charged capitally becoming mad, before arraignment? After having pleaded? After having been found guilty, and before judgment is pronounced? After judgment has been pronounced?

In what light does the law regard drunkenness, with reference to an offence committed by a party under its influence?

What consequence does the law attach to an unlawful act committed by misfortune, or chance?

What is the consequence of an unlawful act committed under ignorance or by mistake?

What is the difference between an unlawful act committed under a mistake of fact, and one committed under a mistake of law?

From what arises the last species of defect of will enumerated by the Commentator?

What principle is illustrated by the case cited of the Sheriff, who, under the orders of Queen Mary, burnt Latimer and Ridley?

Is the coercion of a father, or a master, an excuse for the commission of a crime by a son, or a servant?

When is a wife protected, and when is she not, from punishment for an offence committed in the presence, or under the compulsion of her husband?

How does the law regard crimes and misdemeanors committed under the influence of threats and menaces?

If a man being violently assaulted, have no possible means of saving his life, but by killing an innocent person, would such an act be murder?

On what principle is an Officer of Justice excused for wounding, or even killing, those who would prevent him from arresting a murderer, or other criminal offender?

Is a man in urgent want of food or clothing, justified, according to the English law, in stealing either?

What was the opinion of Grotius and Puffendorf on this question? of Cicero? of King Solomon?

What does the law of England say upon this point?

Can the King commit an offence against law?

On what principle is this founded?

HIGH TREASON.

TREASON (*proditio*) in its very name, which is borrowed from the French, imports a betraying, treachery, or breach of faith. It happens, therefore, only between allies, saith the Mirror: for treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord. This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign: and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, were formerly denominated *petit* treasons. But when disloyalty so rears its crest, as to attack even majesty itself, it is called by way of eminent distinction high treason, *alta proditio*; being equivalent to the *crimen læsæ majestatis* of the Romans, as Glanvil denominates it also in our English law.

As this is the highest civil crime, which, considered as a member of the community, any man can possibly commit, it ought, therefore, to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone, says the president Montesquieu, is sufficient to make any government degenerate into arbitrary power. And yet, by the ancient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of *constructive treasons*;

that is, to raise, by forced and arbitrary constructions offences into the crime and punishment of treason, which never were suspected to be such. Thus the *accroaching* or attempting to exercise, royal power (a very uncertain charge) was in the 21 Edw. III. held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he had paid him 90l.: a crime it must be owned, well deserving of punishment but which seems to be of a complexion very different from that of treason. Killing the king's father, or brother, or even his messenger, has also fallen under the same denomination. The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason. But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2. was made: which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulgued by Augustus Caesar, comprehended all the ancient laws, that had before been enacted to punish transgressors against the state.

The punishment of high treason in general was anciently solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk: though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torture of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.*

* This barbarous and frightful mode of punishment has been since altered by the statute 54 Geo. 3, c. 146, which enacts, that persons convicted or adjudged guilty of high treason, shall be drawn upon a hurdle to the place of execution, and be there hanged by the neck until they are dead; and that afterwards, the head shall be severed from the body, and the body be divided into four quarters, to be disposed of as the king shall think fit. But the second section of the statute provides, that after sentence, the king may, by warrant under the sign manual, direct that the offender shall not be drawn to the place of execution, but be taken thither as may be directed; and that he may not be hanged but be beheaded; and in such case, the method of disposing of the body is left to the discretion of the king.

In treasons of every kind the punishment of women was anciently the same, and different from that of men. For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence, which was to the full as terrible to sensation as the other, was to be drawn to the gallows, and there to be burned alive.*

* But now by the 30 Geo. 3, c. 48, women convicted of treason, or petty treason, shall not be burned to death; but shall be hanged by the neck until dead.

QUESTIONS.

What is Treason?

What were *petit Treasons*?

Why ought the crime of High Treason to be most precisely ascertained? What is Montesquieu's remark on this subject?

What is meant by the expression "constructive treason."

What put an end to this species of treason?

What was the ancient punishment of treason, and what is the present one?

How were women guilty of treason, punished formerly—and how now?

FELONY.

FELONY, in the general acceptation of our English law, comprises every species of crime, which occasioned, at common law, the *forfeiture of lands and goods*. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted. Treason itself, says sir Edward Coke, was anciently comprised under the name of felony: and in confirmation of this we may observe, that the statute of treasons 25 Edw. III. c. 2, speaking of some dubious crimes, directs a reference to parliament; that it may be there adjudged; “whether they be treason *or other felony*.” All treasons, therefore, strictly speaking, are felonies; though all felonies are not treason. And to this also we may add, that not only all offences, now capital, are, in some degree or other, felony; but that this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance-medley, or in self-defence; and petit larceny or pilfering: all which are, strictly speaking, felonies, as they subject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony seems to be that which is before laid down; viz. an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little farther: the word felony, or *felonia*, is of undoubted feudal original, being frequently to be met with in the books of feuds, &c.; but the derivation of it has much puzzled the juridical lexicographers. Prateus, Calvinus, and the rest: some deriving it from the Greek *φηλος*, an impostor or deceiver; others from the Latin, *fallo* *sefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has

Given us a still stranger etymology ; that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as occasions a forfeiture of all the offender's lands or goods. And this gives great probability to sir Henry Spelman's Teutonic or German derivation of it : in which language indeed, as the word is clearly of feudal original, we ought rather to look for its signification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words : *fec*, which signifies, as we well know, the fief, feud, or beneficiary estate ; and *lon*, which signifies price or value. Felony is therefore the same as *pretium feudi*, the consideration for which a man gives up his fief ; as we say in common speech, such an act is "*as much as your life*," or estate "*is worth*," in this sense it will clearly signify the feudal forfeiture, or act by which an estate is forfeited, or escheats to the lord.

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and by a small deflection from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus it was said, that suicide and robbery were felonies ; that is, the consequence of such crimes was forfeiture ; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause why treason in ancient times was held to be a species of felony : viz. because it induced a forfeiture.

QUESTIONS.

What is Felony, in its general acceptation ?

What are the different derivations which have been assigned to this word Felony ?

Which is that preferred by the Commentator—and to what colloquial expression of our own does he compare it ?

What is the cause of Treason being called in ancient times Felony ?

HOMICIDE.

OF crimes injurious to the persons of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great Creator; and, of which therefore no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the Creator has given us; the divine laws, I mean, of either nature or revelation. The subject therefore of the present section will be the offence of *homicide*, or destroying the life of man, in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

Homicide, or the killing of any human creature, is of three kinds: justifiable, excusable, and felonious. The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man is capable of committing.

Justifiable homicide is of divers kinds:

1. Such as is owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who had forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must require it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted, or outlawed, deliberately, uncompelled, and extrajudicially, is murder. For as Bracton very justly observes, "*istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet juxta occidatur iste, tamen occisor peccat mortaliter*"

propter intentionem corruptam." And farther, if judgment of death be given by a judge not authorised by lawful commission, and execution is done accordingly, the judge is guilty of murder. And upon this account sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government, (since it is necessary to decide the disputes of civil property in the worst of times,) yet declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission: a distinction perhaps rather too refined; since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. Also, such judgment, when legal, must be executed by the proper officer, or his appointed deputy: for no one else is required by law to do it, which requisition it is that justifies the homicide. If another person doth it of his own head, it is held to be murder: even though it be the judge himself. It must farther be executed, *serrato juris ordine*; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder: for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law: but if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide: and besides, this licence might occasion a very gross abuse of his power. The king indeed may remit part of a sentence; as, in the case of treason, all but the beheading; but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is to be hanged, the king, it hath been said, cannot legally order even a peer to be beheaded.

Again; in some cases homicide is justifiable, rather by the permission, than by the absolute command, of the law, either for the advancement of public justice, which without such indemnification would never be carried on with proper vigour; or, in such instances where it is committed for the prevention of some atrocious crime, which cannot otherwise be avoided.

Homicide, committed for the advancement of public justice, is; 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. 2. If an officer, or any private person,

attempts to take a man charged with felony, and is resisted, and, in the endeavour to take him, kills him. This is similar to the old Gothic constitutions, which (Stiernhook informs us) "*furem, si aliter capi non posset, occidere permittunt.*" 3. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are, in case of ABSOLUTE NECESSITY, justifiable in killing them. Where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape. But in all these cases there must be an apparent necessity on the officer's side; viz. that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable.

In the next place, such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton, and as it is since declared in statute 24 Hen. VIII. c. 5. If any person attempts a robbery or murder of another, or attempts to break open a house, in the night time, (which extends also to an attempt to burn it,) and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house in the day time, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable in case of nocturnal house-breaking: "if a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him: but if the sun be risen upon him, there shall blood be shed for him: for he should have made full restitution." At Athens, if any theft was committed by night it was lawful to kill the criminal if taken in the fact: and, by the Roman law, of the twelve tables, a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon: which amounts very nearly to the same as is permitted by our own constitutions.

But we must not carry this doctrine to the same visionary length that Mr. Locke does: who holds, that "all manner of force without right upon a man's person, puts

him in a state of war with his aggressor; and, of consequence, that being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilised nature, yet the law of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.

In these instances of justifiable homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error, or omission; so trivial however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

Excusable homicide is of two sorts; either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

1. Homicide *per infortunium*, or misadventure, is where a man doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun, is shooting at a mark, and undesignedly kills a man: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases, according to the circumstances, murder; for the act of immoderate correction is unlawful. Thus by an edict of the emperor Constantine, when the rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death acci-

dentally ensued, he was guilty of no crime : but if he struck him with a club or a stone, and thereby occasioned his death ; or if in any other yet grosser manner, "*immoderate suo jure utatur, tunc reus homicidii sit.*"

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act ; and so are boxing and swordplaying, the succeeding amusement of their posterity ; and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony or manslaughter. But, if the king command, or permit such diversion, it is said to be only misadventure ; for then the act is lawful. In like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games, authorized or permitted by the state, was not held to be guilty of homicide. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful : but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence. And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.

Homicide in self-defence, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime ; which is not only a matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word chance-medley, or, as some rather choose to write it, *chaud-medley*, the former of which in its etymology signifies a casual affray, the latter an affray in the heat of blood or passion ; both of them of pretty much the same import : but the former is in common speech too often erroneously applied to any matter of homicide by misadventure ; whereas it appears by the statute 24 Hen. VIII. c. 5, and our ancient

looks, that it is properly applied to such killing as happens in self-defence upon a sudden rencounter. This right of natural defence does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible, or, at least, probable, means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide (upon chance-medley in self-defence) from that of manslaughter, in the proper, legal sense of the word. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or, having begun, endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently and safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not factitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no such point of honour: because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger, of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law.

And as the manner of the defence, so is also the time to

be considered; for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design. But if A upon a sudden quarrel assaults B first, and upon B's returning the assault, A really and *bona fide* flees; and being driven to the wall, turns again upon B and kills him; this may be *se defendendo* according to some of our writers; though others have thought this opinion too favourable, inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse, of self-defence, the principal civil and natural relations are comprehended: therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.

There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by lord Bacon, where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's, is excusable through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.

Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

Self-murder, the pretended heroism, but real cowardice, of the Stoic Philosophers, who destroyed themselves to

avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law*, yet was punished by the Athenian law with cutting off the hand which committed the desperate deed. And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it; and, as the suicide is guilty of a double offence; one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this amongst the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder. A *felo de se* therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as, if attempting to kill another, he runs upon his antagonist's sword; or shooting at another, the gun bursts and kills himself. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners' juries are apt to carry it, viz. that the very act of suicide is an evidence of insanity; as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy and hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in a former chapter, to form a legal excuse. And therefore if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man.

But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can act only upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial; on the latter, by a forfeiture of all

* "Si quis impatientia doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum."—Ff. 49. 16. 6.

his goods and chattels to the king : hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act.

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt which divide the offence into manslaughter and murder. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this, that manslaughter, when voluntary, arises from the sudden heat of the passions : murder, from the wickedness of the heart.

1. Manslaughter is therefore thus defined, the unlawful killing of another without malice either express or implied : which may be either voluntarily, upon a sudden heat ; or involuntarily, but in the commission of some unlawful act. These were called in the Gothic constitutions *homicidia vulgaria ; que aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu*. And hence it follows, that in manslaughter there can be no accessories before the fact ; because it must be done without premeditation.

As to the first, or voluntary branch : if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter : and so it is, if they upon such an occasion go out and fight in a field : for this is one continued act of passion ; and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself ; yet neither is it murder, for there is no previous malice ; but it is manslaughter. But in this, and in every other case of homicide upon provocation ; if there be a sufficient cooling-time for passion to subside, and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.

Manslaughter, therefore, on a sudden provocation, differs from excusable homicide *se defendendo*, in this : that in one case there is an apparent necessity, for self-preservation,

to kill the aggressor: in the other no necessity at all, being only a sudden act of revenge.

The second branch, or involuntary manslaughter, differs also from homicide excusable by misadventure, in this: that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other: this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or a piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but, if no more was intended than a mere civil trespass, it will amount only to manslaughter.

Next, as to the punishment of this degree of homicide: the crime of manslaughter amounts to felony; the offender shall forfeit all his goods, and be punished by transportation for life, or not less than seven years, or by imprisonment not exceeding four years, with or without hard labour, or by fine. St. 9 G. IV. c. 31, s. 9.

2. We are next to consider the crime of deliberate and wilful murder; a crime at which human nature starts, and which is, I believe, punished almost universally throughout the world with death. The words of the Mosaical law (over and above the general precept to Noah, that "whoso sheddeth man's blood, by man shall his blood be shed") are very

emphatical in prohibiting the pardon of murderers. "Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it."

The name of "*murder*," as a crime was anciently applied only to the secret killing of another; which the word *moerda* signifies in the Teutonic language: and it was defined, "*homicidium quod nullo vidente, nullo sciente, clam perpetratur*," for which the vill wherein it was committed, or, if that were too poor, the whole hundred, was liable to a heavy amercement; which amercement itself was also denominated *murdrum*. This was an ancient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder: and, according to Bracton, was introduced into this kingdom by king Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security to his own Normans. And therefore if, upon inquisition had, it appears that the person found slain was an Englishman, (the presentment whereof was denominated *englescherie*,) the country seems to have been excused from this burthen. But, this difference being totally abolished by statute 14 Edw. III. c. 4, we must now, as is observed by Staundforde, define murder in quite another manner, without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

Murder is therefore now thus defined, or rather described, by sir Edward Coke; "*when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.*" The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, it must be committed by a "person of sound memory and discretion:" for lunatics or infants, as was formerly observed, are incapable of committing any crime: unless in such cases where they shew a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.

Next, it happens when a person of such sound discretion

“unlawfully killeth.” The unlawfulness arises from the killing without warrant or excuse; and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanor, though formerly it was held to be murder. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting with a pistol, or starving. But where they only differ in circumstance, as if a wound be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial. Of all species of deaths, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought. And therefore by the statute 22 Hen. VIII. c. 2, it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed—namely, boiling to death: but this act did not live long, being repealed 1 Edw. VI. c. 12. There was also, by the ancient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many years past: I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed. The Gothic laws punished in this case, both the judge, the witnesses, and the prosecutor: “*peculiari pœna judicem puniunt; peculiari testēs, quorum fides judicem seduxit; peculiari denique et maxima auctorem, ut homicidam.*” And among the Romans, the *lex Cornelia de sicariis*, punished the false witness with death, as being guilty of a species of assassination. And there is no doubt that this is equally murder, in *foro conscientię*, as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. If a man, however, does such an act, of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended: as was the case of the unnatural son, who exposed his sick father to the

air, against his will, by reason whereof he died; of the woman, who laid her child under leaves in an orchard, where a kite struck it and killed it; and of the parish-officers who shifted a child from parish to parish till it died for want of care and sustenance. So too, if a man hath a beast that is used to do mischief; and he knowing it, suffers it to go abroad, and it kills a man; even this is manslaughter in the owner: but if he had purposely turned it loose, though barely to frighten people and make what is called sport, it is with us, as in the Jewish law, as much murder, as if he had incited a bear or dog to worry them. If a physician or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance: but it hath been holden, that if it be not a regular physician or surgeon who administers the medicine or performs the operation, it is manslaughter at the least. In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first.

Farther; the person killed must be "a reasonable creature in being, and under the king's peace," at the time of the killing. Therefore to kill an alien, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman.

Lastly, the killing must be committed "with malice aforethought," to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved, and malignant heart; *un disposition a faire un male chose*; and it may be either express or implied in law. Express malice is when one, with a sedate deliberate mind, and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. This takes in the case of deliberate duelling, where both parties meet

avowedly with an intent to murder; thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has justly fixed the crime and punishment of murder, on them, and on their seconds also.

Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar, so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park: and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia præcogitata* or evil intended before-hand.

Also in many cases where no malice is expressed, the law will imply it: as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. No affront, by words or gestures only, is a sufficient provocation, so as to excuse or

extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as shewed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter, and not murder. In like manner if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder. And if one intends to do another felony and undesignedly kills a man, this is also murder. Thus if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the poisoner had no malicious intent, takes it, and it kills him; this is likewise murder. It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly, malicious: these therefore may suffice as a specimen; and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or if voluntary, occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alledged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. *For all homicide is presumed to be malicious, until the contrary appeareth upon evidence.*

The punishment of murder, and that of manslaughter, were formerly one and the same; both having the benefit of clergy; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. The punishment of death was, however, afterwards allotted

by statute to all murderers without exception, and was accompanied with certain peculiar incidents and solemnities, which are however now abolished by Statute 6 & 7 W. IV. c. 30.

QUESTIONS.

How many kinds are there of *homicide* and what are they called ?

In what manner, and under what circumstances must a sentence of death be executed on a malefactor, in order to make such homicide "*justifiable*" ?

What is the nature of that kind of homicide, which is committed for the advancement of public justice ? State instances.

Which may be killed in attempting to commit their respective crimes, a burglar or a pickpocket ? And on what does this distinction depend ?

What was the Jewish law, the law of Athens, and the law of the Twelve Tables at Rome, with respect to the killing of a thief by the party injured ?

What principle did Mr. Locke lay down in these cases, and is it consonant with the law of England ?

How many kinds are there of excusable homicide ?

How do you define the first of these ? And cite the instances by which it is illustrated ?

What kind of homicide is it that happens in the course of idle, dangerous or unlawful sports ?

What is the consequence of homicide committed in self defence ?

What is the distinction between chance-medley, and manslaughter ?

How does the law regard duelling ?

If two shipwrecked persons are on a plank which will hold but one, is either justified in pushing off the other, to save his own life ? State the grounds for this opinion.

How does the law regard suicide ?

If one should persuade another to commit suicide, how would the law regard his conduct ?

How does the law punish suicide ?

How do you define manslaughter ?

• Can there be accessories before the fact, in manslaughter ? Why ?

Suppose in a sudden quarrel and fight, one person kills another what species of offence is this ?

Suppose a man, violently and suddenly insulted and provoked, were immediately to kill the aggressor, how would the law regard such an act?

How is manslaughter distinguished from excusable homicide *in defendendo*?

Suppose an involuntary killing happens in consequence of an unlawful act, when will it be murder, and when only manslaughter?

How is manslaughter punished?

What was the punishment of wilful murder, under the Mosaic law?

What did the word "murder" anciently import?

What is Sir Edward Coke's definition of murder?

Within what time after the stroke, or cause of death administered must the party die, in order to make the killing murder?

What is the grand criterion distinguishing murder from all other killing?

How many kinds of *malice* are there?

How does this apply to duelling?

What are the instances given in the text, of *implied malice*?

What does the law *presume* concerning homicide?

Who is to *prove* that a given case of homicide is not malicious?

INDICTMENT—GRAND JURY.

AN indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. • To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them.

They are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority.

This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes; and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "*ignoramus*;" or, we know nothing of it; intimating, that though the facts

might, possibly be true, that truth did not appear to them ; but now, they assert in English, more absolutely “ not a true bill ;” or, which is the latter way, “ not found ;” and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse upon it a “ a true bill ;” anciently “ *billa vera*.” The “ *indictment* ” is then said to be “ *found*,” and the party stands indicted. But to find a bill there must at least twelve of the jury agree ; for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours ; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation ; and afterwards by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. And the indictment, when so found, is publicly delivered into court.

QUESTIONS.

What is an Indictment ?

Who constitute the Grand Jury ?

How do they enter upon their inquiries ?

How do they deal with the “ Indictment ? ”

ARRAIGNMENT.

WHEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon.

To *arraign*, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.

When he is brought to the bar, he is called upon by name to hold up his hand: which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand, he owns himself to be of that name by which he is called.

Then the indictment is to be read to him distinctly in the English tongue, (which was law, even while all other proceedings were in Latin,) that he may fully understand his charge. After which it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty.

When a criminal is arraigned, he either stands mute, or confesses the fact; which circumstances we may call incidents to the arraignment: or else he pleads to the indictment.

If he says nothing, the court may order a plea of not guilty to be recorded, and proceed as if he had pleaded it; or may empanel a jury to try whether he be insane, (in which case he cannot be tried;) or dumb by the visitation of God, (in which case the court proceeds as if he had pleaded not guilty.) Stat. 7 & 8 G. IV. c. 28.

Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment.

The plea of not guilty, is the only one on which the prisoner can receive his final judgment, in an indictment of felony or treason.

QUESTIONS.

What is an arraignment ?

If a prisoner, when arraigned, says nothing, what course is pursued ?

What is the duty of the court, if the prisoner at once confess what he stands charged with ?

What is the plea on which alone a prisoner can receive final judgment ?

THE TRIAL.

WHEN the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

Challenges may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls.

In criminal cases, or at least in cases of felony, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all: which is called a peremptory challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner, when put to defend his life, should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

✓ This privilege of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4, which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However it is held, that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without

the persons so challenged. And then, and not sooner, the king's counsel must shew the cause: otherwise the juror shall be sworn.

The peremptory challenges of the prisoner must however have some reasonable boundary; otherwise he might never be tried. This reasonable boundary is settled by the law to be the number of twenty in felony, and thirty-five in treason: and if he challenge more, his challenges are void and to be disregarded. For the law judges that fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, has no intention to be tried at all.

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence examined, by the counsel for the crown, or prosecution.

It was an ancient and commonly received practice, derived from the civil law, that a prisoner accused of a capital crime, should not be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered to the honour of Mary I. whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous, that when she appointed sir Richard Morgan chief justice of the common pleas, she enjoined him, "that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party; her highness's pleasure was, that whatsoever could be brought in favour of the subject should be admitted to be heard: and moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject." Afterwards, in one particular instance, when embezzling the queen's military stores was made felony by statute 31 Eliz. c. 4, it was provided that any person impeached for such felony, "should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence:" and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath: the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir Edward Coke,

protests very strongly against this tyrannical practice ; declaring that he never read in any act of parliament, book, case, or record, that in criminal cases the party accused should not have witnesses sworn for him ; and therefore there was not so much as *scintilla juris* against it. And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland, when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it against the efforts of both the crown and the house of lords, against the practice of the courts in England, and the express law of Scotland, "that in all such trials, for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses to be examined upon oath as can be produced for his clearing and justification." At length by the statute 7 W. III. c. 3, the same measure of justice was established throughout all the realm, in cases of treason within the act : and it was afterwards declared by statute 1 Ann. st. 2, c. 9, that in all cases of treason and felony, all witnesses for the prisoner shall be examined upon oath, in like manner as the witnesses against him.

When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict ; but are to consider of it, and deliver it in, with the same forms as upon civil causes : only they cannot, in a criminal case which touches life or member, give a privy verdict. But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be either general, guilty, or not guilty ; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination of the court ; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths. In many instances, where contrary to evidence the jury have found

the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench; for in such case, as hath been said, it cannot be set right by attain. But there hath yet been no instance of granting a new trial, where the prisoner was *acquitted* upon the first.

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation. And upon such his acquittal, or discharge for want of prosecution, he shall be immediately set at large without payment of any fee to the gaoler. But if the jury find him guilty, he is then said to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways: either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country.

QUESTIONS.

Who may challenge the jury?

What is a peremptory challenge—to whom permitted, and on what principle?

How many peremptory challenges are allowed?

In cases of treason and felony, what was the former, and what is the present practice, as to allowing witnesses to be examined on behalf of the prisoner, charged with treason or felony?

When, where, and how do the jury give their verdict?

Note.—The state of the Criminal Law has for several years past been the subject of anxious consideration in Parliament; and many great alterations have been effected—which are not, however, of a nature to be specified or explained in a work of such a general and elementary character as the present. The last and most striking change is that which has been just effected by the Prisoner's Counsel Bill, (6 & 7 Wm. IV. c. 115,) which enables "persons indicted of felony to make their defence by counsel or attorney."

JUDGMENT AND ITS CONSEQUENCES.

• WHEN the jury have brought in their verdict guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has anything to offer why *judgment should not be awarded against him*. And in case the defendant be found guilty of a misdemeanour, (the trial of which may and does usually, happen in his absence, after he has once appeared,) a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in arrest or stay of judgment: as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again.

A pardon also, as has been before said, may be pleaded in arrest of judgment.

If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime.

And it is one of the glories of our English law, that the species, though not always the quantity or degree, of punishment is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation with which an offender might flatter himself, if his punishment depended

on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law; which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

When sentence of death, the most terrible and the highest judgment in the laws of England, is pronounced, the immediate inseparable consequence from the common law is *attainder*. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed. He is then called *attaint*, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law. This is after judgment: for there is a great difference between a man *convicted* and *attainted*; though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of those disabilities: for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, which supposes some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty: and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.

QUESTIONS.

What question is asked of the prisoner, whom the jury have pronounced guilty? •

What is the peculiar advantage of having the species of punishment ascertained for every offence?

What is the immediate inseparable consequence of judgment of sentence of death?

• What is attainder?

What is the difference• between a man *convicted*, and a man *attainted*?

REVERSAL OF JUDGMENT.

WE are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this ; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A judgment may be falsified, reversed, or avoided, in some cases without a writ of error, thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void : and may be falsified by, shewing the special matter without writ of error.

A judgment may also be reversed, by writ of error ; which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers ; and may be brought for notorious mistakes in the judgment or other parts of the record : as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors, which, though allowed out of tenderness to life and liberty, are not much to the credit or advancement of the national justice.

Lastly, to reverse the attainder by act of parliament. This may be and hath been frequently done, upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours, and estate, or some, or one of them, by act of parliament ; which, so far as it extends, has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence.

When judgment, pronounced upon conviction, is falsified

if reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estate: but he still remains liable to another prosecution for the same offence: for, the first being erroneous, he never was in jeopardy thereby.

QUESTIONS.

How many ways are there of setting aside judgment?

How may judgment be reversed?

What is the effect of reversing the judgment?

REPRIEVE AND PARDON.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

I. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis*; either before or after judgment: as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon.

The last and surest resort is in the king's most gracious pardon; the granting of which is the most amiable prerogative of the crown. Law, says an able writer, cannot be framed on principles of compassion to guilt; yet justice, by the constitution of England, is bound to be administered in mercy; this is promised by the king in his coronation oath, and it is that act of his government, which is the most personal and most entirely his own. The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy. His power of pardoning was said by our Saxon ancestors to be derived *a lege suæ dignitatis*: and it is declared in parliament by statute 27 Hen. VIII. c. 24, that no other person hath power to pardon or remit any treasons or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm.

This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy,

wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons, according to some theorists, should be excluded in a perfect legislation, where punishments are mild but certain; for that the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter; or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender, though they alter not the essence of the crime, ought to make no distinction in the punishment. In democracies, however, this point of pardon can never subsist: for there, nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to centre in one and the same person. This, as the president Montesquieu observes, would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell, whether a prisoner were discharged by his innocence, or obtained a pardon through favour. In Holland, therefore, if there be no stadtholder, there is no power of pardoning lodged in any other member of the state. But in monarchies the king acts in a superior sphere: and, though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, munificence, or compassion. To him, therefore, the people look up as the fountain of nothing but bounty, grace, and honour; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.

The king may pardon all offences merely against the crown or the public; excepting, firstly, that, to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the *habeas corpus* act, 31 Car. II. c. 2. made a *præmunire*, unpardonable even by the king

Nor, secondly, can the king pardon, where private justice is principally concerned in the prosecution of offenders: "*non potest rex gratiam facere cum injuria et damno aliorum.*" Therefore the king cannot pardon a common nuisance while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may remit the fine because, though the prosecution is vested in the king to avoid multiplicity of suits, yet, during its continuance, this offence savours more of the nature of a private injury to each individual in the neighbourhood, than of a public wrong. Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought for thereby the informer hath acquired a private property in his part of the penalty.

There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments: viz. that the king's pardon cannot be pleaded to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the earl of Danby was impeached by his house of commons of high treason, and other misdemeanors, and pleaded the king's pardon in bar of the same the commons alleged, "that there was no precedent, that ever any pardon was granted to any person impeached by the commons of high treason or other high crimes depending the impeachment;" and thereupon resolved, "that the pardon so pleaded was illegal and void, and ought not to be allowed in bar of the impeachment of the commons of England;" for which resolution they assigned this reason to the house of lords, "that the setting up a pardon to be a bar of an impeachment defeats the whole use and effect of impeachments: for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed." Soon after the revolution, the commons renewed the same claim and voted, "that a pardon is not pleadable in bar of an impeachment." And, at length, it was enacted by the act of settlement, 12 & 13 W. III. c. 2. "that no pardon under the great seal of England shall be pleadable to an impeachment by the commons in parliament." But after the impeachment has been solemnly heard and determined

it is not understood that the king's royal grace is farther restrained or abridged: for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.

QUESTIONS.

• What is a Reprieve?

What is a Pardon? How, and by whom granted?

What is the difference between a Monarchy, and a Democracy, with reference to the power of *pardon*ing?

Can the King pardon *all* offences?

Can the King's pardon be pleaded to an impeachment by the House of Commons?

What case in English history raised, and led to the settlement of this question?

Can the king pardon one who has been impeached, after the impeachment has been heard and determined?

THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS

*The Laws of England.**

BEFORE we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations that have happened in the laws of England, I must first of all remind the student, that the rise and progress of many principal points and doctrines have been already pointed out in the course of these commentaries, under their respective divisions; these having therefore been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness; which would be a most tedious undertaking. What I therefore at present propose, is only to mark out some outlines of an English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

The several periods, under which I shall consider the state of our legal polity, are the following six: 1, From the earliest times to the Norman conquest; 2, From the Norman conquest to the reign of king Edward the First; 3, From thence to the Reformation; 4, From the Reformation to the Restoration of king Charles the Second; 5, From thence to the Revolution in 1688; 6, From the Revolution to the present time.

1. And, first, with regard to the ancient Britons, the aborigines of our island, we have so little handed down to

* This very masterly and comprehensive sketch of the history and progress of our laws, forms the concluding chapter of the Commentaries, and is presented entire.

us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless* and defective. However, from Cæsar's account of the tenets and discipline of the ancient Druids in Gaul, in whom centred all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey,) to be instructed, we may collect a few points which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly, the very notion itself of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters: since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavel-kind*, which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII., is undoubtedly of British original. So likewise is the ancient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions†. And we may also remember an instance of a slighter nature mentioned in the present volume‡, where the same custom has continued from Cæsar's time to the present; that of burning a woman guilty of the crime of petit treason by killing her husband.

The great variety of nations, that successively broke in upon and destroyed both the British inhabitants and constitution, the Romans, the Picts, and, after them, the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages, in regard to the rights of property and

* Gavel-kind was a custom by which lands descended to all the sons at once, instead of the eldest son only.

See *ante*, page 287—289.

† The fourth volume of the Commentaries.

the punishment of crimes. So that it is morally impossible to trace out with any degree of accuracy when the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce, that this custom was derived from the Britons; that was left behind by the Romans; this was a necessary precaution against the Picts; that was introduced by the Saxons; discontinued by the Danes, but afterwards restored by the Normans.

Wherever this *can* be done, it is a matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice: so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government: which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of its laws; unless we had as authentic monuments thereof as the Jews had by the hand of Moses. Thirdly, this uncertainty of the true origin of particular customs must also in part have arisen from the means whereby christianity was propagated among our Saxon ancestors in this island; by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause that we find not only some rules of the mosaical, but also of the imperial and pontifical laws, blended and adopted into our own system.

A farther reason may be also given for the great variety of course the uncertain original, of our ancient esta

lished customs; even after the Saxon government was firmly established in this island: viz. the subdivision of the kingdom into an heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, Anglo Saxons, and the like, originally sprung from the same mother-country, the great northern hive; which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments; and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where seven unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

When therefore the West Saxons had swallowed up all the rest, and king Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as masterly a manner: no less than to new-model the constitution; to rebuild it on a plan that should endure for ages; and, out of its old discordant materials which were heaped upon each other in a vast and rude irregularity, to form one uniform and well-connected whole. This he effected, by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours: for to him we owe that master-piece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating, ducts and channels; which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and

digested them into one uniform system or code of laws, in his Dom-*bec*, or *liberjudicialis*. This he compiled for the use of the court-baron, hundred, and county-court, the court-leet, and sheriff's tourn*; tribunals, which he established, for the trial of all causes civil and criminal, in the very districts wherein the complaint arose : all of them subject however to be inspected, controlled, and kept within the bounds of the universal or common law, by the king's own courts ; which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses which he continually made from one end of the kingdom to the other.

The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric : but a plan, so excellently concerted, could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their ancient law : retaining however some few of the customs of their late visitants ; which went under the name of *Dane-Lage* : as the code compiled by Alfred was called the *West-Saxon-Lage* ; and the local constitutions of the ancient kingdom of Mercia, which obtained in the countries nearest to Wales, and probably abounded with many British customs, were called the *Mercen Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm : the provincial polity of counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution ; though the laws and customs therein used have, (as we shall see,) often suffered considerable changes.

For king Edgar (who besides his military merit as founder of the English navy, was also a most excellent civil governor), observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and began what his grandson king Edward the Confessor afterwards completed ; viz., one uniform digest or body of laws to be observed throughout the whole

*The court-baron was the court of civil, and the court-leet that of criminal jurisdiction, within a *manor*. The county-court was that of civil, and the sheriff's-tourn that of criminal jurisdiction, within a county. The hundred-court was in the hundred, what the county-court was in the county.

kingdom : being probably no more than a revival of king Alfred's code, with some improvements suggested by necessity and experience ; particularly the incorporating some of the British, or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-Lage*, which was still the ground-work of the whole. And this appears to be the best supported and most plausible conjecture, (for *certainly* is not to be expected), of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of 'the common law,' as extending its authority universally over all the realm ; and which is doubtless of Saxon parentage. •

Among the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliaments, or rather, general assemblies of the principal and wisest men in the nation : the *wittena-gemote*, or *commune consilium* of the ancient Germans, which was not yet reduced to the forms and distinctions of our modern parliament, without whose concurrence, however, no new law could be made, or old one altered. 2. The election of their magistrates by the people : originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers, or heretochs, their sheriffs, their conservators of the peace, their coroners, their port-reeves, since changed into mayors and bailiffs, and even their tithing-men and borsholders at the leet, continued, some to the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued : only that, perhaps, in case of minority, the next of kin of full age would ascend the throne, as king, and not as protector ; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence, even the most notorious offenders being allowed to commute it for a fine or were-gild, or, in default of payment, perpetual bondage ; to which our 'benefit of clergy' has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feudal consti-

tion; but yet were exempt from all its rigorous hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feudal law; before it 'got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest: though, really inconvenient, and more especially destructive to ancient families: which are in monarchies necessary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice consisted principally of the county courts, and in cases of weight or nicety the king's court held before himself in person, at the time of his parliaments, which were usually holden in different places, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide. An institution which was adopted by king Alonzo VII. of Castile, about a century after the conquest: who at the same three great feasts was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home. These county courts however differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the earldorman or sheriff sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials among a people who had a very strong tincture of superstition, were permitted to be by ordeal, by the *coroned* or morsel of execration*, or by wager of law.

* The trial by *coroned*, which was a kind of ordeal, was when the defendant took the sacrament, invoking Heaven at the same time to witness his innocence, and praying that the sacramental bread might choke him if guilty of falsehood.

with compurgators *, if the party chose it, but frequently they were also by jury: for, whether or not their juries consisted precisely of twelve men, or were bound to a strict unanimity; yet the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors. Thus stood the general frame of our polity at the time of the Norman invasion; when the SECOND PERIOD of our legal history commences.

II. This remarkable event wrought as great an alteration in our laws, as it did in our ancient line of kings: and though the alteration of the former was effected rather by the consent of the people, than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued. ••

1. Among the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because, the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates. •

2. Another violent alteration of the English constitution consisted in the depopulation of whole countries, for the purposes of the king's royal diversion; and subjecting both them and all the ancient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon

* *'Wager of law'* was, when the defendant, instead of trying his cause by witnesses of the facts, before a jury, swore solemnly in court that he was in the right, and procured a certain number of other persons, to swear that they believed him, upon which he was acquitted without further inquiry. The non-professional reader will be surprised to hear that this mode of trial was in force within the last two years!

times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone; and no man was entitled to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express licence from the king, by a grant of a chase or free-warren: and those franchises were granted as much with a view to preserve the breed of animals as to indulge the subject. From a similar principle to which, though the forest laws are now mitigated, and by degrees grown entirely obsolete, yet from this root has sprung a bastard slip, known by the name of the game laws, now arrived to and wanting in its highest vigour; both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons: but with this difference, that the forest laws established only one mighty hunter throughout the land, the game laws have raised a little Nimrod in every manor*.

3. A third alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the original jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected; and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman, instead of the English language. A provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till king Edward the third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one mischief

* The game laws are much altered and improved by recent enactments.

too deeply rooted thereby, and which this caution of king Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtilties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the era of refinement and subtilty. There is an active principle in the human soul, that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate its progress, were such only as were cloistered in monasteries, the rest being all soldiers or peasants. And, unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind; the establishment of religion, and the regulations of civil polity; yet having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtilties, with a skill most amazingly artificial; but which serves no other purpose, than to show the vast powers of the human intellect, however vainly or preposterously employed.—Hence law in particular, which, being intended for universal reception, ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon feudal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede, as they did in great measure, the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth, these scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance.

Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour; and the endeavour has greatly succeeded: but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities, in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of a metaphysical and Norman jurisprudence.

4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century: and from them it passed to other nations, particularly the Franks and the Normans: which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation;* the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and *holden*, mediately or immediately, of the crown.

The nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, and ambitious, and a politic prince to create. The consciences of men were enslaved by sour ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived; who now imported from Rome for the first time the whole farrago of superstitious novelties which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the wor-

* See them explained, *ante* 268—276.

ship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws too, as well as the prayers, were administered in an unknown tongue. The ancient trial by jury gave way to the impious decision by battle. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy curfew. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons. Unheard of forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And to crown all, as a consequence of the tenure by knight service, the king had always ready at his command an army of sixty thousand knights or *milites*, who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade or foreign merchandise, such as it then was, was carried on by the Jews and Lombards; and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who from their insignificancy happily retained, in their socage and burgage tenure, some points of their ancient freedom. All the rest were villeins or bondmen.

From so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors to redeem themselves and their posterity into that state of liberty which we now enjoy: and which therefore is not to be looked upon as consisting of mere encroachments on the crown, and infringements on the prerogative, as some slavish and narrow-minded writers in the last century endeavoured to maintain: but as, in general, a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that

restoration has, in a long series of years, been step by step effected, I now proceed to inquire.

William Rufus proceeded on his father's plan, and in some points extended it; particularly with regard to the forest laws. But his brother and successor, Henry the First, found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring, as our monkish historians tell us, the laws of king Edward the Confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary fruits of his feudal tenures; but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the curfeu; for, though it is mentioned in our laws a full century afterwards, yet, it is rather spoken of as a known time of night, so denominated from that arrogated usage, than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments, that of theft being made capital in his reign, and a few things relating to estates, particularly as to the descent of lands; which being by the Saxon laws equally to all the sons, by the feudal or Norman to the eldest only, king Henry here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops, and mitred abbots; reserving however these ensigns of patronage, *conge d'eslire*, custody of the temporalities when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained in his father's time: from whence we may easily perceive how far short this was of a thorough restitution of king Edward's, or the Saxon, laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to

redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of king Henry the Second, if not earlier, the charter of Henry the First seems to have been forgotten: for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public, than the parcelling of estates into a multitude of minute subdivisions. However in this prince's reign much was done to methodize the laws, and reduce them into a regular order; as appears from that excellent treatise of Glanvill: which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the First, it carries a manifest superiority. Throughout his reign also was continued the important struggle of which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the First; when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign, of Henry the Second, there are four things, which peculiarly merit the attention of a legal antiquarian: 1. The constitutions of the parliament at Clarendon, A.D. 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction: though his farther progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere*, the king having divided the kingdom into six circuits, a little different from the present, and commissioned these new created judges to administer justice, and try writs of assize, in the several counties. These remedies are said to have been then first invented: before which all causes were usually terminated in the county courts,

according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. 4. To this time must also be referred the introduction of escuage, or pecuniary commutation for personal military service; which in process of time was the parent of the ancient subsidies granted to the crown by parliament, and the land-tax of later times.

Richard the First, a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest laws with some rigour; which occasioned many discontents among his people: though, according to Matthew Paris, he repealed the penalties of loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron, which are still extant, and of high authority; for in his time we began again to discover, that, as an island, we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre: the king's thoughts being chiefly taken up by the knight-errantry of a croisade against the Saracens in the Holy Land.

In king John's time, and that of his son Henry the Third, the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first king John, and afterwards his son, consented to the two famous charters of English liberties, *magna charta* and *charta de foresta*. Of these the latter was well calculated to redress many grievances, and encroachments of the crown, in the exertion of forest

law : and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time ; though now, unless considered attentively, and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains ; prohibited for the future the grants of exclusive fisheries ; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights : it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children : it laid down the law of dower, as it hath continued ever since ; and prohibited the appeals of women, unless for the death of their husbands *. In matters of public police and national concern : it enjoined an uniformity of weights and measures ; gave new encouragements to commerce, by the protection of merchant strangers ; and forbade the alienation of lands in mortmain. With regard to the administration of justice : besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses ; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits ; it also corrected some abuses then incident to the trials by wager of law and of battle ; directed the regular awarding of inquest for life or member ; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer : and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities,

* An *appeal* was a criminal proceeding, which might be instituted by one private individual against another. It is now wholly abolished.

boroughs; towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great* charter,) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land.

However, by means of these struggles, the pope in the reign of king John gained a still greater ascendant here than he ever had before enjoyed; which continued through the long reign of his son Henry the Third: in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive, in Bracton's treatise, a still further improvement in the method and regularity of the common law, especially in the point of pleadings. Nor must it be forgotten, that the first traces which remain, of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of king John, though omitted in that of Henry III.: and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. The *THIRD* commences with the reign of Edward the First; who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm, that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

It would be endless to enumerate all the particulars of these regulations: but the principal may be reduced under the following general heads. 1. He established, confirmed, and settled, the great charter, and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction: and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common pleas, and exchequer; so as they might not interfere with each other's proper business: to do which they must now have

recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 4. *He settled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to causes of no great amount, according to their primitive institution; though of considerably greater, than by the alteration of the value of money they are now permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages, levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. He settled the form, solemnities, and effect of fines*, levied in the court of common pleas; though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are ancients than the reign of his father, and those were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of *elegit*; which was of signal benefit to a trading people; and, upon the same commercial ideas, he also allowed the charging of lands in a statute merchant †. to pay debts contracted in trade, contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law

* *Fines* and *Recoveries* were fictitious suits at law, by means of which an estate which had been *entailed*, (i. e. conveyed in such a way as to descend inalienably from father to son, so as never to pass out of one particular family,) might be set free and rendered alienable. This was done by pretending that some person, who had a better title to it than the family on which it was entailed, had recovered it from that family by a suit at law, and agreed to hold it for the benefit of those to whom it was desirable to transfer it. These fictions are, however, now abolished, and a simpler mode of setting entailed estates free is provided by a recent Act of Parliament.

† This was a kind of bond.

was extremely deficient. 13. He also effectually closed the great gulf, in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. 14. He established a new limitation of property by the creation of estates tail; concerning the good policy of which modern times have, however, entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws, of England, which was thoroughly completed in the reign of Henry the Eighth; and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

I might continue this catalogue much further—but upon the whole, we may observe, that the very scheme and model of the administration of common justice between party and party, was entirely settled by this king; and has continued nearly the same, in all succeeding ages, to this day; abating some few alterations, which the humour or necessity of subsequent times hath occasioned. The forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings, consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatises, written in his time, as Britton, Fleta, Hengham, and the rest, are, for the most part law at this day; or at least were so, till the alteration of tenures took place... And, to conclude, it is from this period, from the exact observation of *magna charta*, rather than from its making or renewal, in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head; though the weight of the military tenures hung heavy upon it for many ages after.

I cannot give a better proof of the excellence of his constitutions, than that from his time to that of Henry the Eighth there happened very few, and those not very considerable, alterations in the legal forms of proceedings. As to matter of substance: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people, in the reigns of Edward II. and Edward III.; and justices of

the peace were established instead of the latter. In the reign also of Edward the Third the parliament is supposed most probably to have assumed its present form; by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly: and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *præmunire* for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry the Seventh the civil wars and disputed titles to the crown gave no leisure for farther juridical improvement: "*nam silent leges inter arma.*"—And yet it is to these very disputes that we owe the happy loss of all the dominions of the crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe

the method of barring entails by the fiction of common recoveries *; invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward the Fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of USES, another of the clerical invention†.

* See note, p. 390.

† *Uses* were invented by the craft of the regular ecclesiastics, who, being prohibited by the statutes of mortmain from acquiring property in land, hit upon this mode of possessing themselves of all the benefits attendant upon the ownership of landed property, without infringing the statutes which forbid them from becoming its actual proprietors. They induced those devout persons who were anxious to better their estate for masses, requiems, and benedictions, to convey it to certain lay persons who became nominally the owners of it, but in reality agreed to hold it for the benefit and *use* of the monastic body, whom the last owner was desirous to endow; and though the courts of common law refused to recognise such an agreement, which was, in point of fact, a gross evasion of the statute law of the realm, it nevertheless was recognised by the Court of Chancery, which in those times was always presided over by an ecclesiastic, and was enforced by a process entitled the writ of *subpena*, invented for that express purpose by John Waltham, Bishop of Salisbury, and chancellor to King Richard the Second.

An *use* was, therefore, a right to have the profits of land, the bare possession of which was in another person.

These *uses* were soon found exceedingly convenient to the lay as well as the ecclesiastical part of the community. For the *use* or right to have the profits, being quite different and distinct from the land itself (since one man might have the land and another the *use* or right to the profits), did not subject its owner to those grievances which the feudal system imposed upon the proprietors of land: such for instance as those *aids*, *marriages*, *primer seisins*, *finer*, *reliefs*, and *wardships*, which have been described at a previous part of this volume; and, therefore, for the purpose of escaping these inflictions, it became very common for purchasers of land to have it conveyed to some third person or persons for their *use*, by which means they escaped the burthens, while they secured the benefit attendant upon landed property.

This was, as will be easily believed, very disgusting to the king and the great feudal lords, who found their dues evaded and their victims withdrawn from their grasp by this species of half-legal, half-ecclesiastical legerdemain. They therefore determined to eradicate the contrivance, root and branch; and for this purpose they, in the reign of King Henry the Eighth, procured a statute to be passed, entitled the *Statute of Uses*, by which it was enacted that whenever one man gave land to another for the *use* of a third person, that third person should, instead of having only a right to the profits, become the actual owner of the land itself; so that by this statute, the persons

In the reign of king Henry the Seventh, his ministers, not to say the king himself, were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in

who had previously had only the use or a right to the profits of land found themselves turned into its actual proprietors, and brought as such within the clutch of that feudal tyranny which they had so cunningly attempted to avoid. However, they were soon rescued, and the object of the king and lords completely frustrated, by a decision of the courts of law; who held, in construing this statute, that although, if land were given to A for the use of B, B must be now considered as its actual owner; yet, that if one step further were taken, and the land was given to A for the use of B, and B was directed to hold it for the use of C, this last person would not become the proprietor of the land itself, but would have just such a right to the profits as B would have had, before the passing of the statute: and this right C could obtain the aid of the Court of Chancery to enforce, just as B might have done before the statute. So that, in point of fact, the only real alteration in the law the statute made, was to cause one name more to be inserted in a conveyance of land—for instance, that of C, in the example above given. The Court of Chancery indeed did not apply the name of *use* to the beneficial interest of C, but denominated it a *trust*, and the enforcement of these *trusts* continues to the present day to be the most important subject of its jurisdiction.

But the *Statute of Uses*, though it did not effect the end its makers intended, gave rise to other very important results; for the conveyancers, a race of men quite as astute as the monks, soon found that they could render it conducive to an object at which they had long aimed, *viz.* that of concealing the transfers of property, which they were in the habit of making, from public knowledge. To explain this, it is necessary to remind the reader that, during the simplicity of olden times, a transfer of land from one man to another was always accompanied with the ceremony of actually investing the new owner, by taking him to the land, and there, in the presence of all the neighbours, who were called upon to witness the transaction, *enscuffling* him, i. e. putting him in corporal possession of his new property. So that if a conveyancer advised a country gentleman to mortgage his estate, the gentleman had to go down there, and proclaim his necessities to the whole parish, by delivering it up in public to the person who advanced the mortgage money; or else to incur great expense, accompanied with equal publicity, by sending an attorney to perform that ceremony. But when the *Statute of Uses* had directed that every person entitled to the use or profits of land, should be in law the actual owner of the land itself, it soon struck the conveyancers that they had nothing to do but, to make the seller, or mortgagor of lands agree to hold it for the use of the buyer or mortgagee, and that the statute would instantly make the latter the actual owner, without any journey to the country, or any corporal investiture. Acting on this idea, they now, when lands were to be sold, prepared what was called a deed of *bargain and sale*, by which the seller 'bargained' and 'sold' them to the buyer. And this being an agreement to hold them henceforth for the buyer's use, the buyer became, by the statute of uses, actual owner without any public ceremony, or the intervention of any body, except the conveyancer. And

framing any new beneficial regulations. For the distinguishing character of this reign, was that of amassing treasure in the king's coffers, by every means that could be devised : and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object. To this end the court of star-chamber was new-modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to aliene. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the FOURTH period of our legal history, viz. the reformation of religion, under Henry the Eighth, and his children, which opens an entire new scene in ecclesiastical matters ; the usurped power of the pope being now for ever routed and destroyed, all his connexions with this island cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. And, had the spiritual courts been at this time re-united to

though there was, it was true, a statute which required that these deeds of *bargain and sale* should be enrolled in the public archives, so as to be accessible to such as would take the trouble of searching for them, still a great deal of secrecy was obtained, for the execution of the instrument was managed in the utmost privacy : and the conveyancers soon invented a means of accomplishing the transfer by two instruments called a *lease* and *release*, which conveyed the ownership of the land as well as a *bargain and sale*, and did not, like the *bargain and sale*, require enrolment. And in this mode are lands at the present day usually transferred, whether by way of sale or mortgage, from one man to another.

From the above account it will be seen how indissolubly connected are the studies of English law and English history. We have just observed the ambition of the priesthood inventing a system for their own peculiar aggrandisement, which has been adopted by the lawyers, first as a means of evading feudal tyranny, and afterwards of carrying the most ordinary arrangements of every-day life into effect ; while the attacks made on this system by the monarch and the aristocracy have resulted in the creation of one of the most complicated and extensive branches of the jurisdiction of the Court of Chancery.

the civil, we should have seen the old Saxon constitution with regard to ecclesiastical polity completely restored.

With regard also to our civil polity, the statute of wills, and the statute of uses (both passed in the reign of this prince), made a great alteration as to property: the former, by allowing the devise of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of uses, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense: which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which, notwithstanding they may differ in forms, are now equally adopted by the courts of both law and equity. From the statute of uses, a remarkable alteration took place in the mode of conveyancing: the ancient assurance by feoffment and livery upon the land being now very seldom practised, since the more easy and more private invention of transferring property by secret conveyances to uses, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

The further attacks in this reign upon the immunity of estates-tail; the establishment of recognizances in the nature of a statute staple, for facilitating the raising of money upon landed security; and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate, trader; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to re-assume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy: and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII. a very distinguished era in the annals of juridical history.

It must be however remarked, that, particularly in his later years, the royal prerogative was then strained to a very tyrannical and oppressive height ; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament ; and others concurred in the creation of an amazing heap of wild and new-fangled treasons. Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince ; during the short sunshine of which, great part of these extravagant laws were repealed. And, to do justice to the shorter reign of queen Mary, many salutary and popular laws, in civil matters, were made under her administration ; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery : the well-concerted schemes for effecting which were, through the providence of God, defeated by the seasonable accession of queen Elizabeth.

The religious liberties of the nation being, by that happy event, established, we trust, on an eternal basis (though obliged, in their infancy, to be guarded against papists and other non-conformists, by laws of too sanguinary a nature) ; the forest laws having fallen into disuse ; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward the First, without any material innovations ; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements : except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked that the spirit of enriching the clergy and endowing religious houses had, through the former abuse of it, gone over to such a contrary extreme, that the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the re-

straining statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and clothing of millions, by affording them the means, with proper industry, to feed and clothe themselves. And, the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

However, considering the reign of queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the English constitution. For, though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet the increase of the power of the star-chamber, and the erection of the high commission court in matters ecclesiastical, were the work of her reign. She also kept her parliament at a very awful distance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppress individuals, but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit: but at the same time it is sufficient to show, that these were not those golden days of genuine liberty that we formerly were taught to believe: for, surely, the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the sovereign.

The great revolutions that had happened, in manners and in property, had paved the way, by imperceptible, yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterward reduced its power. It is obvious to every observer, that, till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the

clergy. The commons were generally in a state of great ignorance; their personal wealth before the extension of trade, was comparatively small; and the nature of their landed property was such, as kept them in continual dependence upon their feudal lord, being usually some powerful baron, some opulent abbey, or sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or thought of; nay even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler; which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

But when learning, by the invention of printing, and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass, and the consequent discovery of the Indies; the minds of men thus enlightened by science, and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury, (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves,) and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound; while the king by the spoil of the monasteries and the great increase of the customs grew

rich, independent, and haughty; and the commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burthens or oppressive exactions, during the sudden opulence of the exchequer. Content upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed of opposing the prerogative, to which they had been so little accustomed: much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were therefore the times of the greatest despotism that have been known in his island since the death of William the Norman: the prerogative, as it then stood by common law, (and much more when extended by act of parliament,) being too large to be endured in a land of liberty.

Queen Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father king Henry the eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the queen of Scots, occasioned greater caution in her conduct. She probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore threw a veil over the odious part of prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of the people.

On the accession of king James I. no new degrees of royal power were added to, or exercised by, him; but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy

occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported; and common reason assured them, that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability as well as inclination to resist it: and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial: and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitations of suits and actions, and the regulating of informations upon penal statutes. For I cannot class the laws against witchcraft and conjuration under the head of improvements; nor did the dispute between lord Ellesmere and sir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of justice.

Indeed, when Charles the first succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the crown most unseasonably revived. The legal jurisdiction of the star-chamber and high commission courts was extremely great; though their usurped authority was still greater. And, if we add to these the disuse of parliaments,

the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given; for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the star-chamber and high commission courts, for ascertaining the extent of forests and forest-laws, for renouncing ship-money, and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feudal tenures: though it must be acknowledged that these concessions were not made with so good a grace as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befall a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed, therefore, with the success they had gained, fired with resentment for past oppressions, and dreading the consequences if the king should regain his power, the popular leaders (who in all ages have called themselves the people) began to grow insolent and ungovernable; their insolence soon rendered them desperate; and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign.

I pass by the crude and abortive schemes for amending the laws in the times of confusion which followed: the most promising and sensible whereof (such as the establishment of new trials, the abolition of feudal tenures, the act of navigation, and some others) were adopted in the

V. FIFTH period, which I am next to mention, viz. after the restoration of king Charles II. Immediately upon which, the principal remaining grievances, the doctrine and consequences of military tenures, were taken away, and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the regal government was restored, and with it our ancient constitution, deserves no commendation from posterity, yet in his reign, wicked, sanguinary, and turbulent as it was, the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, since its total abolition at the conquest. For therein not only the slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from incumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the *habeas corpus* act. These two statutes, with regard to our property and persons, form a second *magna charta*, as beneficial and effectual as that of Runny-mede. That only pruned the luxuriances of the feudal system; but the statute of Charles the second extirpated all its slaveries; except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice. *Magna charta* only, in general terms declared, that no man shall be imprisoned contrary to law. the *habeas corpus* act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the test and corporation acts, which secure both our civil and religious liberties; the abolition of the writ *de hæretico comburendo*; the statute of frauds and perjuries, a great and necessary security to private property*; the statute for distribution of intestate estates

* This statute, which was passed to prevent the frauds and perjuries that arise from the uncertainty of human recollection and oral testimony renders it necessary that all sales of land, all leases for more than three

and that of amendments and *jogfaits* *, which cut off those superfluous niceties which so long had disgraced our courts ; together with many other wholesome acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce : and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, “ that the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by law, in the reign of king Charles the second.”

It is far from my intention to palliate or defend many very iniquitous proceedings, contrary to all law, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestable is this ; that by the law, as it then stood, (notwithstanding some invidious, nay dangerous, branches of the prerogative have since been lopped off, and the rest more clearly defined,) the people had as large a portion of real liberty, as is consistent with a state of society ; and sufficient power residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power : the people both could, and did, resist him ; and, in consequence of such resistance, obliged him to quit his enterprise and his throne together. Which introduces us to the LAST period of our legal history ; viz.

VI. From the revolution in 1688 to the present time. In this period many laws have passed ; as the bill of rights, the toleration act, the act of settlement with its conditions, the act for uniting England with Scotland, and some others : which have asserted our liberties in more clear and emphatical terms : have regulated the succession of the crown by parliament, as the exigences of religious and

years, all agreements that are not to be completed within a year, all guarantees, all sales of goods above the value of ten pounds unless accompanied with tender, part-payment, or earnest, shall be in writing, signed. It prescribes the solemnities necessary for the due execution of wills, and contains a variety of other useful enactments.

* Which obviate the ill consequences of certain merely formal mistakes in actions.

civil freedom required; have confirmed, and exemplified, the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty, consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the house of commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have, by the desire of his present majesty, set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have, by the like desire, made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the opposite scale (what perhaps the immoderate reduction of the ancient prerogative may have rendered in some degree necessary) the vast acquisition of force, arising from the riot act, and the annual expence of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has, gradually and imperceptibly, gained almost as much in influence, as it has apparently lost in prerogative.

The chief alterations of moment (for the time would fail me to descend to *minutiæ*) in the administration of private justice during this period, are the solemn recognition of the law of nations with respect to the right of ambassadors; the cutting off, by the statute for the amendment of the law, a vast number of excrescences, that in process of time had sprung out of the practical part of it; the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto*; the regulations of trials by jury, and the admitting witnesses

for prisoners upon oath; the farther restraints upon alienation of lands in mortmain; the annihilation of the terrible judgment of *peine forte et dure*; the new and effectual methods for the speedy recovery of rents; the improvements which have been made in ejectments for the trying of titles; the introduction and establishment of paper credit, by indorsements upon bills and notes; the translation of all legal proceedings into the English language: the erection of courts of conscience for recovering small debts, and, which is much the better plan, the reformation of county courts; the great system of marine jurisprudence, of which the foundations have been laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases; and, lastly, the liberality of sentiment, which, though late, has now taken possession of our courts of common law, and induced them to adopt, where facts can be clearly ascertained, the same principles of redress as have prevailed in our courts of equity from the time that lord Nottingham presided there. And these, I think, are all the material alterations that have happened with respect to private justice in the course of the present century.

Thus, therefore, for the amusement and instruction of the student, I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rise, and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they have gradually emerged, and risen to the perfection they now enjoy, at different periods of time. We have seen, in the course of our inquiries, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages: that the forms of administering justice came to perfection under Edward the first; and have not been much varied, nor always for the better, since; that our religious liberties were fully established at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely

regained till after the restoration of king Charles, nor fully and explicitly acknowledged and defined, till the era of the happy revolution. Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due;—the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure: defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright and noblest inheritance of mankind.

[CONTINUATION TO THE YEAR 1825, BY MR. JUSTICE COLERIDGE*, ONE OF THE MOST EMINENT OF THE PRESENT JUDGES OF THE SUPERIOR COURTS AT WESTMINSTER.]

I WISH it were in my power, to finish this sketch of our legal history in the same faithful and spirited manner in which the author has begun and carried it down to his own time. Since the year 1780, in which he died, the legislature has provided ample materials for one who saw things in so liberal and comprehensive a spirit, and arranged them in such striking and lucid order. In regard to legal and judicial matters, he might have pointed out the restraint

* Extracted from his edition of the Commentaries.

imposed on the arrest of the person, and the right given to a discharge on making a deposit with the arresting officer; the assistance afforded to inferior courts by arming them with the process of the superior where necessary; the prevention of delay in the trial of misdemeanors, and the salutary increase of severity in their punishment; the great general diminution of the number of capital offences, and the necessary and wise addition made to the severity of substituted and inferior punishments; the making capital certain aggravated attempts at murder, and the simplifying the trial of certain enormous treasons; the abolition of many punishments, as that of the pillory and the burning or whipping of females: and of the barbarous and shocking parts of others, as that of embowelling in treason; the suppression of appeals in treason, murder, or felony, and and of the trial by battle in civil suits; the taking away corruption of blood, except in cases of treason or murder; the provision for the expenses of prosecutions in felony, and for the care and disposal of lunatic offenders; the great improvements in the systems of gaols and houses of correction; the declaration of the functions of the jury in the case of libel; the regulation of the ecclesiastical courts; the trial and punishment of offences committed on the high seas, or in the colonies; and last, not least, the revision and consolidation of the laws, which regulate that great bulwark of our liberties, the trial by jury.

As measures calculated to secure the integrity of the representative body, Sir W. Blackstone would probably have noticed the act for securing the independence of the Speaker; those which prevent public contractors, and certain public officers, from sitting in the House; which suspend or remove bankrupt members from their seats; and prohibit persons filling offices in the revenue from voting at elections.

In matters of general or internal polity, he would have pointed out the formation of a regular system and jurisdiction for the punishment, as well as relief of insolvent debtors; the many amendments, and finally the consolidation, of the bankrupt law; the great diminution of the disabilities of Roman Catholics and dissenters; the liberal alterations in the spirit of the navigation laws; the attempts to estimate accurately the increase of population by a census taken at stated intervals, and a more careful keeping

of parochial registers; the sensible and humane attempts to modify and improve the poor laws; the protection and encouragement afforded to friendly societies, and the institution of banks for the savings of the poor; the grand measure of the Union with Ireland; the honest rerunciation of the slave trade for ourselves, and the sincere and repeated endeavours to procure its abolition by all other nations.

These might form some of the features of the picture with which the Commentaries might have closed, if they had been written 'in the present day'; the system is still imperfect, and many things remain to be done, which the author might, perhaps, have suggested with something of judicial authority. Without thinking myself entitled to do so, I may venture to express not only my wishes for the gradual perfecting of the English laws and constitution, but my strong conviction, that they will continue to be improved with the increasing lights of the age. It is our great blessing to have the machinery of improvement always ready to work, in a legislature which, though almost permanently sitting, is yet drawn from the general body of the people, forms part of it, mixes in all its businesses and amusements, and is acted upon by all its hopes, fears, and interests. The very facility of legislation perhaps leads to inconvenience in the multiplying of laws, and in provoking attempts to remedy inconveniences which must be borne, or prevent evils which the unassisted prudence of individuals might more wisely be left to guard against. But these are comparatively slight evils, not counterbalancing the great good of possessing a power of improvement perpetually advancing with the age. It becomes not the commentator on the laws to indulge in a spirit of indiscriminate approbation; perhaps it was the leaning of Sir W. Blackstone's mind to take too favourable a view of his subject, a more excusable failing than the opposite one of a captious and querulous spirit; but I think he might have reasonably indulged the conviction which I have expressed above, because the characteristic of the legislature for the last fifty years has been a sincere desire of general improvement; and a particular zeal for the bettering the condition of the lower or unfortunate classes of society. Fewer measures, purely aristocratic, have passed into laws than heretofore; while no proposition has been coldly received, that was

sensible in its details, and had for its object the reformation of the criminal, the instruction of the ignorant, the dissemination of sound religion, the vindicating the rights of the oppressed, or the gradual advancement of the labouring and mechanic orders of the population.

[CONTINUATION FROM THE YEAR 1825, TO THE PRESENT TIME, BY ONE OF THE COMPILERS OF THIS VOLUME.]

THE few years which have elapsed since the above sentences were penned by the learned annotator, have given birth to more and greater changes in the English law than are comprised in any entire century of its previous existence. At the head of those statutes which have produced important alterations in the CONSTITUTION, is the act emancipating his Majesty's Roman Catholic subjects from the disabilities under which they formerly laboured. Next in order are the statutes for amending the representation of the people in Parliament; which, by withdrawing the elective franchise from some classes, extending it to many others, altering the method of election, and prescribing means for ascertaining the qualifications of electors, has wrought a great and organic change in the legislative system of this realm.

Among the enactments peculiarly affecting our COLONIAL interests, must be distinguished the act which prohibits slavery throughout the British empire, providing at the same time compensation for those whose property is injured by the consequences of that measure; the statute which provides a judicature for our West India colonies, and that which regulates the future government of British India, the care of which is still entrusted to the Company—stripped, however, of its commercial privileges; while the natives of that vast peninsula are allowed much more extensive capacities than they have heretofore enjoyed under our empire, and the trade with China is thrown open to the competition of all his Majesty's subjects.

Among the important changes in our DOMESTIC POLITY, must be pointed out the Act of Municipal Reform, which has popularised and remodelled the various municipal corporations throughout the kingdom, with the exception only of the metropolis; the act for the amendment of the

Poor Laws, which, by confiding the administration of those laws to a central board, and accompanying the relief afforded to the indigent by circumstances which render it far less desirable than formerly, has tended, whether wisely or unwisely, to deter the applicant, unless impelled by actual and pressing need, and to diminish the burden upon those classes who contribute to the fund destined for the relief of their indigent fellow subjects; the abolition of the Palatine peculiarities of the county of Durham; the Tithe Commutation Act, which has enabled persons anxious to exempt their lands from the payment of that species of ecclesiastical contributions to do so upon equitable and advantageous terms of compromise; the alteration in the law of Marriages effected to relieve the scruples of the dissenting classes of our population, and which points out a mode in which the matrimonial contract may be solemnized without the intervention of the Church of England; the erection of a general registry for Births, Deaths, and Marriages, by which it is hoped that the memory of such events will be preserved more faithfully than heretofore; and the general Highway Act, providing a new system for the management of our great national thoroughfares.

Among the acts designed to benefit the COMMERCIAL INTERESTS of the nation, may be reckoned that which renews the charter and defines the privileges of the Bank of England; that which erects a new tribunal denominated the Court of Bankruptcy, for the administration of that important branch of commercial law; the improvements effected in our maritime code by the alteration in our navigation and ship-registry acts, the consolidation of the custom laws, and the act passed for the regulation of our merchant seamen; the partial abolition of the Usury Laws, whereby bills and notes having no more than three months to run, may be negotiated at any rate of interest; the improvement of our law of patents, which encourages the enterprise of inventors by affording additional protection to their ingenuity; that which settles the general standard of weights and measures; that which defines the liability of common carriers, and that which enables his Majesty to bestow on trading companies several important privileges which heretofore could only have been conferred by the transcendent authority of Parliament.

Among changes respecting the GENERAL ADMINIS-

TRATION OF THE LAWS, may be enumerated, the alteration of the amount for which a debtor may be legally arrested from the sum of ten, to that of twenty pounds; the act which sweeps away the old intricate system of process, and substitutes an easy and intelligible method of commencing actions in the courts of common law; the Law Amendment Act, which destroys several antiquated forms, expedites and cheapens the trial of causes of slight importance, enables the judges to amend and obviate technical errors, arms them with a power which they have not been slow to exercise, of introducing regulations calculated to render our system of pleading more effectually subservient to the ends of justice, and renders more efficient the tribunal of the arbitrator; the consolidation of the Welsh and English Judicatures; the appointment of an additional Judge to each of the superior courts; the act dispensing with a number of useless oaths, the multitude of which tended to induce disregard of those most solemn invocations of the Deity, by rendering their use too frequent in matters of trivial importance; the destruction of the numerous and antiquated tribe of real actions, and the remodelling of the Court of Privy Council for judicial purposes.

Among enactments concerning THE REGULATION OF PRIVATE PROPERTY, may be enumerated, the act which renders a man's real property liable after his death to the claims of all his creditors; the acts which ascertain the period at which rights and titles shall be rendered secure by lapse of time and uninterrupted continuance of possession; which define the right of the wife to dower out of her husband's, and that of the husband to curtesy, as it is called, out of the wife's, real property; which alter the law of descents, by allowing the parent to inherit to the child, and letting in the half-blood, who were formerly excluded by an arbitrary rule of feudal policy; and that which substitutes easy and simple forms for the complicated and abstruse ones of fine and recovery.

Lastly: our CRIMINAL LAW has been improved by the abolition of the disabilities under which Quakers and Moravians formerly laboured of giving evidence for or against the prisoner. The statutes which composed its bulk have been consolidated; the punishment of death abolished in numerous instances; and the accused has at length obtained the right, heretofore denied him in prose-

cutions for felony, of making his full defence, by counsel, and inspecting the depositions of those who charged him with the crime for which he stands indicted.

These are the most prominent of the alterations which have, within the last ten years, been effected in the English law and constitution. It would ill become the Compilers of such a work as this, to canvass the policy of any of them. Experience will probably show, that, like other human institutions, they contain good mixed with evil. But the very experience which detects the former, will help to point out the true method of correcting it, while the continuance of the latter may, and let us trust will, be insured, by that willing obedience to existing laws, that steady attachment to the constitution, that charity to fellow subjects, and loyalty to the Crown, which have ever remarkably distinguished the English people.

QUESTIONS.

What are the six periods in the progress of our laws that are considered in the foregoing chapter ?

With regard to the FIRST of these periods: Do Caesar's Commentaries supply any valuable information? What?

What is the great parent source here pointed out of the confusion and uncertainty in the laws and antiquities of this kingdom?

What does the Commentator seek to illustrate, when he speaks of the difficulty of discerning the changes of the bed of a river, which varies its shores by continual decreases and alluvions?

What was the influence of the heptarchy upon our laws and antiquities?

When, by whom, and how was the first great attempt made to simplify and systematise the laws and constitution of England?

What effect, upon this arrangement, had the Danish invasion and conquest?

What part did Edgar take in these affairs?

State some of the most remarkable of the Saxon laws.

What great event dates the commencement of the SECOND period of our legal history?

What was the first of the alterations then effected?

What were the *forest laws*, and what was their effect?

What great change was effected in the constitution and mode of working the courts of justice?

What was the effect produced, by introducing the subtleties of Norman jurisprudence?

What are the observations made upon this topic by the Commentator?

What was the last and greatest alteration effected, at this period, in our civil and military polity?

What line of policy was adopted by Henry I.? By Stephen?

In what condition was Henry the First's charter, in the time of Henry II.?

What great legal writer flourished in the reign of Henry II.?

What are the four great points to be noticed in the history of the reign of Henry II.?

Is there anything worthy of note, in a legal and constitutional point of view, in the reign of Richard I.?

What are the leading features of the reign of John, and Henry III.?

What may be considered as the commencement of the THIRD period of our legal history?

What did Sir Matthew Hale remark concerning the first thirteen years of the reign of Edward I.?

Can you give an outline of the leading reforms originated and carried into effect by this King?

Did he increase or limit the powers of the Pope, and his Clergy?

Did he prescribe any rules to the superior and inferior courts of justice?

What effect had the statutes of Quia Emptores, of Winchester? of Mortmain?

Did he do anything towards ameliorating the general method of legal proceedings?

Did he attend to the interests of commerce and manufactures?

What interrupted the progress of juridical improvement from the time of Edward I. to Henry VII.?

What were *Fines, Recoveries, Uses*?

Do you understand the explanation of the latter term, given in the note to page 402?

What was the distinguishing character of the reign of Henry VII.?

How did he go to work to obtain these ends?

From what reign may the FOURTH period of our legal history be dated?

What was the first great feature of this reign?

What were the means by which a fundamental change was then effected in the laws of property?

What indicated the rapid growth of the commercial character of the people in this reign?

What was the state of the royal prerogative in this reign?

What remark does the Commentator make upon the reign of Queen Mary? Of Queen Elizabeth?

What were the 'restraining statutes'?

Was any provision made for the relief of the poor in this latter reign?

Had this Queen an arbitrary and despotic tendency?

Were the importance and power of the commons increased or diminished, during this reign? By what means?

What were the chief characteristics of the reign of James I.?

Were any attempts made, in this reign, to improve the administration of justice?

What were the leading features of the reign of Charles I.?

From what event is the commencement of the FIFTH period dated?

What was the first grand change effected in the reign of Charles II.?

What great measure of this reign does the Commentator compare with Magna Charta, and distinguish from it? How?

What other measures of importance distinguished this reign?

What is the SIXTH and last period of our legal history, fixed by the commentator?

Can you give a general account of the spirit and tendency of the legislative changes effected immediately after the revolution of 1688?

What are the general conclusions drawn by the Commentator from the foregoing summary?

What are the principal points contained in the continuation of Mr. Justice Coleridge, from the period of the Commentator, to the year 1825?

Have many changes of a general and important description taken place during the interval between 1825 and 1836?

Give an outline of them.

GLOSSARY.

[It has been thought advisable to select and briefly explain some of the few terms in the following pages which might appear possessed of technical obscurity, or be otherwise difficult to be understood by young and non-professional readers.*]

DOME-BOOK, [Dom-*bec*, or *Liber Judicialis*] pp. 28, 386. This book of *laws*, &c. compiled by Alfred, which is now lost, must not be confounded with *Domesday Book*, pp. 259, 260, [*Liber-judicialis, vel censualis Angliæ*], made in the time of William the Conqueror, and now remaining in the Exchequer, fair and legible, containing a survey of all the *lands* in England. The word "*day*" is added to "*Dom*," not, as has been often supposed, with any allusion to the final 'day of judgment,'—but to strengthen and improve it; and signifies the judicial decisive record or book of '*dooming*,' (i. e. decreeing or dispensing judgment and justice.) It is by this book that the question is to be decided whether lands are *ancient Domesne* or not, and there is no appeal from it. The Conqueror himself submitted to be determined by it. It has been transcribed and printed, for convenience of reference.

CIVILITER MORTUUS, p. 65. The account here given of these words explains the origin and force of the phrase 'to have and to hold for the term of his *natural* life,' used in those instruments by which an estate for life is created.

PRÆMUNIRE, pp. 83, 138, 180, 317, *et passim*. This mysterious and formidable word seems to be corrupted from, or apparently synonymous with *præmoneri* [i. e. "to be forewarned"], and therefore according to the proverb, "fore-armed." It is named from the words of the writ—" *Præmunire facias* A. B., i. e., 'Cause A. B. to be forewarned' that he appear before us to answer the contempt

* Most, if not all, of the ensuing explanations have been taken, with some alterations, from Tomlin's Law Dictionary, and those portions of Blackstone's Commentaries which are not contained in the present volume.

wherewith he stands charged." This *contempt* took its origin from the exorbitant power claimed and exercised in England by the pope, and was originally ranked as an offence immediately against the king, because it consisted in introducing a foreign power into this land and creating *imperium in imperio*, by paying that obedience to *papal* process, which constitutionally belonged to the king alone. The penalties of *præmunire* have been since applied to other offences, some of which bear more, some less, and some no relation to the original offence. Whenever it is said that a person has "incurred the penalties of a *præmunire*," it is meant to express, that he thereby incurs the penalties, which, by the different statutes above mentioned, are inflicted for the offences therein described.

BANKRUPT, p. 87. This word is said to be derived from *banct* s or *banque* (i. e. the table or counter of a tradesman), and *ruptus*, 'broken,' denoting, therefore, one whose shop, or place of trade, is broken, or gone. It is observable that the title of the first English statute concerning this offence* (for such bankruptcy was originally considered), (34 Henry VIII., c. 4.) "against such persons as do make bankrupt," is a literal translation of the French idiom '*qui font banque route*.'

LINEAL AND COLLATERAL DESCENT of the Crown, p. 109. To understand this expression, it must be known that consanguinity, (or kindred) is either *lineal* or *collateral*. Lineal consanguinity or kindred, is that which subsists between persons of whom one is descended in a direct 'line' from the other; as between son and father, grandfather, great grandfather, and so upwards, in the *direct ascending line*; or between father and son, grandson, great grandson, and so downwards, in the *direct descending line*. Collateral consanguinity, or kindred, signifies the relation subsisting between those who descend from the same stock or ancestor, but who do not descend from one another—e. g. Adam had two sons, Cain and Abel; the children of Cain would be related to the children of Abel, as collateral kinsmen because they all lineally descend from their common

* The classical reader needs not to be reminded that by the laws of the twelve tables, in ancient Rome, bankruptcy was treated as a crime; "and without any distinction of fraud or misfortune, exposed the insolvent debtor to the mercy of his creditors, who might put him to death, dissect, or quarter him, and distribute his remains among them!" See For-gusson's Hist. of the Roman Repub. Bk. I. c. ii. Others, however, do not thus understand the language of the twelve tables, but consider the word "*corpus*" to signify merely the debtor's estate, property, or effects—that it was this which might be "cut to pieces" (*secari*) and divided among his creditors. See Adam's Rom. Antiq. 42.

GLOSSARY.

ancestor Adam, and all have a portion of his blood in their veins, which makes them '*consanguineos*.' This distinction it is of very great importance to know accurately, or the account of the succession to the throne of the various kings and queens, given at pages 109, 110, cannot be understood.

PRIMOGENITURE, p. 109. '*Primogenitura*' signifies, the title of an elder son, or brother, in right of his birth : the reason of which, Lord Coke says is, *Qui prior est tempore, potior est jure*.

REPRESENTATION, *ib.* The doctrine of *representation* (i. e. the personating another) is to be thus understood. If the father dies in the life-time of the grandfather, leaving a son and also a brother, the son will inherit the grandfather's estate, as *heir by representation* ; i. e. will stand in his father's place ; will personate him, and have all his privileges, &c.

WITTENA-GEMOTE, pp. 114, 298. This is a compound Saxon word (*wittena*, and *gemote*), signifying *conventus sapientium*, i. e. a convention, or assembly of great men, to advise and assist the king : in short, our '*parliament*.'

DEFEAZANCE (or Defeasance)—*Indefeasible*, pp. 110, 126.—From the French *defaire*, to defeat or undo.

LIMITATION, pp. 130, 131, *et passim*. A technical word, having several significations ; but in the sense here used, a '*limitation*' of an estate, or of the crown—it means, a modification or settlement of an estate, determining how long—in what manner—it shall continue, either in a given possessor, or series of possessors.

POSTLIMINIUM, p. 176. A term taken from the ancient Roman law. Captives in war did not properly lose the rights of citizen which rights were only suspended, and might be recovered, as it was called, *jura postliminii*, i. e. the right of *restoration*, or *return*. In like manner, if any foreigner, who had obtained the freedom of Rome, returned to his native city, and again became a citizen of it, he ceased to be a Roman citizen. This was called '*postliminium*,' with regard to his own country, and *rejectio civitatis* with regard to Rome.

ADVOWSON, 186, *et passim*.—'*Advocatio*,' signifies the right of presentation to a church or benefice ; and he who has this right, is called the *patron* : because those who originally obtained the right of presentation to any church, were *maintainers* of, or benefactors to the same church ; it being presumed that he who founded the church will '*avow*,' [*advocabit*, will justify or maintain an act formerly done], and take it into his protection, and be a patron to defend its just rights.

JUSTICIARS—JUSTICES, pp. 298, 299, 308, 309, *et passim*. The

young reader will observe the distinction between 'Justices,' and 'Judges'—'*Justiciarii*' and '*Judices*.' Hence, 'Lord Chief *Justice*,' not Lord Chief *Judge*.' The reason is, that the justices are officers *deputed* by the King (who is *ultimus judex*) to administer justice, and to do right by way of judgment. "They are called *justices*, because in ancient time the Latin word for a judge was *justitia*: and for that he hath his authority *by deputation*, and not *jure magistratus*."—[See p. 156.]

TALLIAGE, [or *tallage*] *tallagium*, p. 399, *et passim*, from the French *taille*. This word is metaphorically used for a part for a share of a man's substance, *carved*, or '*cut out*,' of the whole, paid by way of tribute, toll, or tax. Hence, the statute of Edw. I.: "*De tallagio non concedendo*."—Sir Edward Coke says, that '*tallage*' is a general word for all '*taxes*.'

MANDAMUS—*passim*. This is a great prerogative writ. It is, a *command*, issuing in the King's name from the Court of King's Bench only, and directed to any person, corporation, or inferior court of judicature, within the King's dominions, requiring, or commanding them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least *supposes* to be consonant to right and justice. It ought to be used on all occasions, where the law has established no specific remedy, and where in justice there ought to be one. It takes its name from the operative word with which it commences.

—QUO WARRANTO—*passim*. This is a writ which lies against any person or corporation, that usurps any franchise or liberty against the King, without good title; and requires the usurper to show and answer to our lord the King "*by what warrant* he claims to have, use, and enjoy the liberties, privileges, and franchises, in dispute."

ADDENDUM to p. 55.

Since the early portions of this work were printed off, the Palatine jurisdiction of the County Palatine of Durham has been separated from the Bishopric of Durham and vested in the crown, by statute 6 & 7 Wm. IV. c. 19. (Passed on the 21 June, 1836.)

